Withdrawal/Redaction Sheet
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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. resume	re: John P. Carey (partial) (2 pages)	03/23/1993	P6/b(6)
002. resume	re: Brian J. Sexton (partial) (1 page)	03/23/1993	P6/b(6)
003. resume	re: Judy Wurtzel (partial) (1 page)	03/23/1993	P6/b(6)
004. resume	re: David Thomas Goldberg (partial) (1 page)	03/23/1993	P6/b(6)
005. resume	re: Jennifer Chang (partial) (1 page)	03/23/1993	P6/b(6)
006. resume	re: Joanne M. Pokaski (partial) (1 page)	03/23/1993	P6/b(6)
007. memo	John Carey to John Emerson re: Vetting Process for Supreme Court Nominees (1 page)	03/23/1993	P5 6481
008. note	Beth to Ron re: Club Membership (1 page)	07/19/1993	P5 b(6)

COLLECTION:
Clinton Presidential Records
Counsel's Office

OA/Box Number: 3911

FOLDER TITLE:
RBG [Ruth Bader Ginsburg] Vetting [1]

2006-1067-F
jp2214

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
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C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
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6481
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THE WHITE HOUSE

WASHINGTON

93 MAR 24 P5:20

DETERMINED TO BE AN ADMINISTRATIVE MARKING Per E.O. 12958 as amended, Sec. 3.3 (c)
Initials: IGP Date: 12/16/10
2006-1067-F13

March 23, 1993

~~CONFIDENTIAL~~

MEMORANDUM FOR JOHN EMERSON

FROM: JOHN P. CAREY, COUNSEL OPP JPC.

SUBJECT: VETTING PROCESS FOR SUPREME COURT NOMINEES

Per our discussions, the Counsel's Office of OPP would be prepared to assist in the public record "vetting" process for Supreme Court nominees. There are four lawyers on staff who clerked for Judges in the federal or state system that could be of assistance as the process goes forward. Listed below are the attorneys with judicial clerkship experience, the names of the Judges for whom they clerked, and the years they served as law clerks:

John P. Carey, former law clerk to the Honorable June L. Green, U.S. District Court for the District of Columbia, 1983-1985

Brian J. Sexton, former law clerk to the Honorable Daniel J. O'Hern, Supreme Court of New Jersey, 1984-1985

Judy Wurtzel, former law clerk to the Honorable Dolores K. Sloviter, Chief Judge, Court of Appeals for the Third Circuit, 1989-1990 and former law clerk to the Honorable Barbara B. Crabb, Chief Judge, U.S. District Court for the Western District of Wisconsin, 1988-1989

David T. Goldberg, former law clerk to the Honorable Ruth Bader Ginsburg, United States Court of Appeals for the District of Columbia Circuit, 1991-1992

I have attached their resumes for your review. I also attach the resumes of our two top researchers Jennifer Chang and Joanne Pokaski, both of whom were active in the campaign and have been handling research since the early days of the Transition.

Please let us know how we can help.

cc: Bruce Lindsey, Esq.

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. schedule	re: Schedule for Ruth Bader Ginsburg (partial) (1 page)	07/10-19/1993	P6/b(6)
002. notes	Handwritten Notes (10 pages)	n.d.	P5 6483

COLLECTION:
Clinton Presidential Records
Counsel's Office

OA/Box Number: 3910

FOLDER TITLE:
[Judge Ruth Bader Ginsburg] [Folder 2]: RAK Notes

2006-1067-F
jp2208

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
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⑥ RR - right to be free from crime - 1st civil right of all Americans?

① Habeas

✓ - Central trend of Courts cases? ← No habeas power in DC
✓ - Is ten years too long?
✓ - Powell Report?
✓ - Teague - Is it settled law?
  • what role, your DP views?
  • Butler?
✓ - JANET VANOVER letter

② Exclusary Rule
- Leon: Is it settled law - or BLW precedent?
- Apply to non-warrant cases?
- Cupelled by carsitch?

③ Death Penalty

X (A) - ACLU: cannabis policy?
(B) - oppose DP in all instances?
  - why?
  - even w/ 20 yrs appeal
  - even w/ federal constitution
✓ (C) ① Tell us your legal view?
  - why not?
  ② - Why "3 strikes for Roe" but "85 strikes for DP?" Friends of ACLU get special treatment?
  ③ Open-minded on DA?
✓ (D) - Recall Gaston in 1976 who Court upheld Furman?
  - Strike it then - or to anyone since?
  - To whom?
✓ (E) - Lawless like WJB or Thx?
  - Judge or CAG?
✓ (F) Special aggravation for cops?
(G) Coker
  ① settled - no non-homicidal death?
  ② Treason? Espionage?

open to policy

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③ DP for Drug Muggers

(A) Race a problem in crimil law syst?
- Racial bias in DP?
- Could statistics alone ever be enough?
- Race discrim between cocaine & crack?

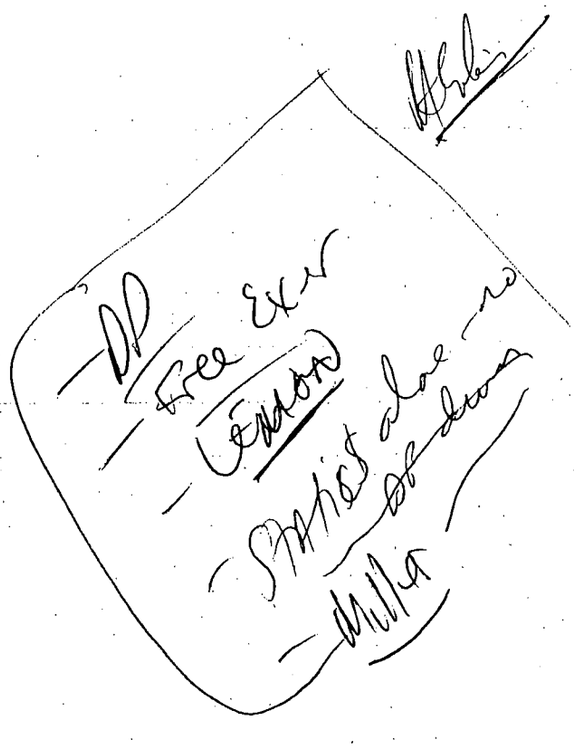
④ General Criminal Issues

- Life for 3X losers?
- Mandatory minimums?
- Sentencing Guidelines
  - too tough, too lenient] good
  - good or bad

⑤ Miranda

- Constitutionally mandated
- §3501 of Safe Streets Act

⑥ Police Brutality
- serious problem in U.S.
- suits for injunctive
- individual damages



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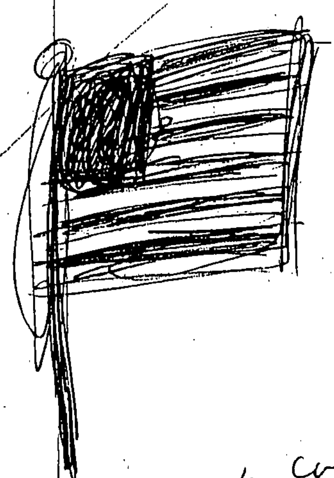
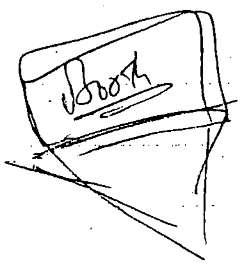
7/13-98





- 17 types to cut
- 2 - now 16

- I cannot answer - give answer that you can

- Use cap aggravat
OK on victims

- like AMK will not talk of
Post cutting of DP

not 80 answer
- firm line
- not talk about it
"that's where I'll draw the line"

- Responding to Deal

Mock 1

1. Why against DP?
- ACLU
- Oppose any ACLU policies?
- Name 1 you oppose

- an opp
- never said anything
- never spoke

2) Constitutional View on DP
a) What is it?
b) Why not - Judge Scalia did? SOC did?
c) Mainstream view
104 of 106 say yes
- TM didn't say - got what we did

- never constitutional
- multiple ...

d) - ever expressed in private
- white
- life
- judge
- ...
- of CT

c) ever formulated a view
- of CT

4. Crime Victims rights
- right to speak at trial?
- habeas reform

3. Schwarzschild
- race in DP
- don't rule out use of stats
- what would you look at

Any view that Schwarzschild influenced very much your work

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Cert

+ → U.S. Cert

Q. women's rt to choose?
A. my position w/respect to regard Harlan in Poe autonomy
Current precedent of USSCt. reaffirmed

[yes]

Q. Is it your view?

A. Part and parcel of constitutional stds for basic right of individual to determine own destiny w/out undue interference

Q. Right / privacy?

A. Derives from fundamental right to equality & autonomy

Q. Equality?

Privacy in Q Cuts on 3 Cuts 4 addressed in specific context they have Brandeis dissent in Olmstead

Q. Roe on 3rd / 4th A?

A. Could have rested on 3/4 19th amend reality of citizen 14th amend

open w/lead

Yes Sen. I do. just let me explain why

Q + A

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Q. Suggested a basis of Repro freedom

A. Choice to give birth
Struck – / great

1. autonomy
2. Religious freedom
3. equal dignity

Q. Any time during pregnancy?

A.
1985 speech – rationale – defended
Result Roe –

Line of not answering

Undue burden – reserve judgment

3rd trimester abortion

3rd trimester abortion

Abortion funding – if new legislation

and → settled law

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#11 — — Metzenbaum

• Changes in Madison lecture?

• "Wildly inaccurate" anything that I have ever written in this area — owe debt to Sylvia Law

– 3 times so far / 4th set
clarifying changes
sometimes understood, sometimes misunderstood

NYT – good piece

– Looking at reviews
– Changes in written lecture very light
– minimal changes / not are changes
~~– att~~

• In your speech Roe, gradual way dealing w/ problem – court might have moved step-by-step

• Source of some concern why step-by-step – but jitters

What is ERA ~~argument~~?

What would be uplift of ERA?

Changes in the Madison lecture

Interested in how the Madison lectures changed?

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Respond to harms

- Democratic
- Mikva dissent
- O'Connor

- defer
- points

Q. Access to the courts

- AFGE v. O'Connor:

- does not recall it

A. ~~too~~

- Preserve standing - always tried to keep courthouse doors open

- Randall ~~is in this court's tradition~~ - story w/ a happy ending

★ When was case settled?

- within a shorter period of time
- through the [illegible]

★ Disabled Rights Group v. Kluge

group lacks standing +

- Disabled Group lost chance to [illegible] in court
- Challenge of statute when statute came up

NB find moderation

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(1) How did NBC get stuck defending ACLU

— I am a mother + a grandmother

(3) — Do not support porn
— Oppose porn as a man / not G/C
(Kathy Hackett)

(2) As a mother + grandmother cannot handle porn

(4) Literate — settled by precedent
Zoning — seem acceptable

How settled? (on what basis?)

(5) "Give it thought" no restrictions on carrying of kids —

(6) Too much offense / ACLU ~~doesn't~~ who cares about ACLU

(7) Too largely — end of day — would draw a line

(8) Seeing a ACLU book like a Bible

(9) Agency — will come up
Cannot comment

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Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. list	re: Confirmation Team Phone List (1 page)	n.d.	P6/b(6)
002. agenda	re: Meeting (partial) (1 page)	07/15/1993	P6/b(6)
003. schedule	re: Schedule for Ruth Bader Ginsburg (partial) (1 page)	07/10-19/1993	P6/b(6)
004. schedule	re: RBG - Faculty Schedule (1 page)	n.d.	P6/b(6)
005. notes	Notes from Meeting of June 23, 1993 (3 pages)	06/23/1993	P5 6484
006. list	re: People Who Were Helpful During the Period Which Judge Ginsburg Prepared for Her Confirmation Hearing (3 pages)	08/05/1993	P6/b(6)
007. list	re: People Who Were Part of Ginsburg Confirmation Team (Others) (3 pages)	08/08/1993	P6/b(6)
008. schedule	re: Schedule for 10 Days Before Hearings (partial) (1 page)	07/10-19/1993	P6/b(6)

COLLECTION:
Clinton Presidential Records
Counsel's Office

OA/Box Number: 3910

FOLDER TITLE:
[Judge Ruth Bader Ginsburg] [Folder 2]: [Mock Hearing Schedule, Agenda, Notes, Thank Yous & Appendix]

2006-1067-F
jp2210

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
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Notes from meeting of ~~July~~ June 23, 1993

Seidman, Brophy, Berman, ~~Kline~~ Kahn, Klain

* Would be useful to get some republicans from the outside who will let us know what they hear from committee and senate republicans - Mike

* Ginsburg could be asked to respond to Lani's substantive positions. Has she read any of the relevant articles?

* Committee Republicans are looking for the letters that the President received on behalf of Ginsburg. They will not get same but they might look for some of them by asking the nominee.

* Ask her about any information she has about any campaign to help her secure the nomination

* Rumor is that some abortion rights zealot in the White House advised Marty Ginsburg to start a campaign to overcome questions about her position on choice

* There is a group of 8 - 10 lawyers who are reviewing all of her opinions and catagorizing them...They will then prepare 3 separate memoranda
  - 2 page summary sheet on her views on various subjects as reflected in those opinions...these will be ready not later that June 28
  - detailed memorada on the essence of the decisions
  - potential areas of questioning that they can identify

* Memoranda will also be prepared comparing her positions to the right and left wings of her court

* A group of lawyers and Wilmer, Cutler are doing a detailed analysis of her written and spoken work outside of the court

* The madison lectures are getting considerable attention especially on the issue of whether she has made any changes that would make her look more sympathetic to the pro-choice psotiion. It is her view that she has only made word changes on substance changes in preparation for publication which will not come until the fall but drafts are floating around.

* howard is meeting with Marty and the Judge so they will understand the process and the need for them to not involve themselves in an active role in the coming weeks leading up to the confirmation.

* Kline to look for law school types who can engage in the briefing process using the materials that are being prepared.

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* The Souter and Thomas preparation materials are available in DOJ and Kline and Greenfield will review them to determine which materials we want to copy.

* With a few exceptions the mock hearing panel should be composed of people who are in the administration and who are not likely to appear before the court....find out whether Dellinger can participate given his promise to keep OLC out of judicial politics. Consider the inclusion of staff people from the hill who are not involved in the Senate Judicary Committee work.

* A group of lawyers at Covington and Burling is preparing a review of the pattern of questions at the last for hearings for nominees and O'Connor

* Ricki is working to get the relevant video tapes for the judge to review. Ron will also identify particular exchanges in several of the hearings that should particularly be brought to the Judge's attention.

* Given her history of disassociating herself with any clubs that discriminate...there could well be questions about whether membership in such clubs should be debilitating.

* Her chron files have been reviewed and there is nothing of note.

* Jeff Peck and Mark Gittenstein are working with the Judiciary Committee.

* The first mock hearing should be Friday afternoon July 9 and should just be for a couple of hours to let the Judge start warming up. The Tuesday and Friday mock hearings the next week should be all day affairs.

* Determine where preparation work should take place given that there is too much going on at the court house.

* Helene...arrange to get 180 for the Friday 7/9 session in addition to the hold that is on the room for the following week.

* Proposed schedule of briefings and mock hearings

  - Week of July 5
    - Separate Briefing and Q & A sessions on selected issues
    - Tuesda, Wednesday, Thursday
    - Friday...mock hearing 2:00 p.m.

  - Week of July 12
    - July 13...mock hearing
    - July 14...briefing and Q & A session on selected issues

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- July 15...rehearse opening statement
  briefing and Q & A on selected issues
- July 16...mock hearing
- July 17, 18, 19 - hold

- Week of July 19
  - Hearing begins July 20
  - Close session - 4:00 p.m. Friday 7/23

- Should go over this schedule with Judge at earliest convenient time

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Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001a. list	re: Judge Breyer's Confirmation Team (partial) (1 page)	05/13/1994	P6/b(6)
001b. list	re: Contacts for Judge Breyer (partial) (4 pages)	05/13/1994	P6/b(6)
002. memo	Lloyd Cutler to POTUS; re: Supreme Court Appointment (2 pages)	04/16/1994	P2, P5, P6/b(6)
003. memo	Douglas Band to Charles Ruff et al re: Supreme Court Nomination Background (4 pages)	06/19/1998	P5 6485

COLLECTION:
Clinton Presidential Records
Counsel's Office
Sarah Wilson
OA/Box Number: 22011

FOLDER TITLE:
Memo Re: Supreme Court Nominations - Ginsburg & Breyer [1]

2006-1067-F
jp2231

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
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6485

THE WHITE HOUSE

WASHINGTON

June 19, 1998

MEMORANDUM FOR CHARLES F.C. RUFF, MARK CHILDRESS, ROBERT WEINER, BILL MARSHALL, SARAH WILSON, AND MICHAEL O'CONNOR

FROM: DOUGLAS J. BAND DJB

SUBJECT: SUPREME COURT NOMINATION BACKGROUND PROCESS INFORMATION

I have completed reviewing the additional boxes of material pertaining to the selection, nomination, and confirmation of Ruth Bader Ginsburg and Stephen Breyer. In doing so, I reviewed an additional 48 boxes, the majority of which pertain to the preparation of the candidates. It is clear that an enormous amount of work was put into not only preparing the candidate, but also in preparing materials supporting them, time consulting numerous individuals, and significant materials on each issue that could arise in the confirmation process. Mock hearings and interviews were held, group consultations were conducted, and a confirmation team was established.

Attached, you will find a few of the materials that I found that may be helpful as this process moves forward. Lists of those consulted, transcripts of press conferences, a listing of periodicals used throughout the process, possible questions raised in press conferences and announcement proceedings are attached. Additionally, I have attempted to determine how the group proceeded procedurally on the issues of vetting, selection, consultation, timing, and nomination.

The Retirement Announcement

The two announcements of retirement by Justices White and Blackmun were handled in very different fashions. Justice White announced his retirement through a letter to the President, that is attached, on the morning of March 19, 1993. That afternoon, the President issued a statement that I have also attached for your review.

Justice Blackmun's retirement announcement was done through a ceremony in the Roosevelt Room on April 6, 1994. Justice Blackmun, accompanied by his wife, stood as the President made remarks on his career and told the American people that he was retiring at the end of the 1994 term. The President's remarks, which I have attached, were followed by brief remarks from Justice Blackmun and questions from the press corp. Immediately following the

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announcement, Mr. Cutler held a press briefing in the briefing room and answered questions from the press corp. His remarks during the press conference are also attached.

It should be noted that the President left Washington at 9:55 the morning that Justice White sent his resignation letter, March 19, 1993, and did not return until 6:35 that evening. The press release was most likely done in Atlanta, where the President was traveling that day. Although the President was traveling, there was no advance notice given to the White House of Justice White's resignation other than the letter he sent to the President that morning.

Time line

Justice Ginsburg was nominated on June 14, 1993, almost three months after the resignation announcement of Justice White and confirmed on July 29, 1993. Justice Blackmun announced his retirement on April 6, 1994. Judge Breyer was nominated for his seat on May 16, 1994, 5 weeks and 3 days after the resignation announcement of Justice Blackmun, and confirmed on August 3, 1994.

Selection and Consultation

For the first vacancy, the group looked at dozens of candidates which could explain the significant amount of time it took to select one. The second vacancy team appears to have used the first list, although I have not found any documentation that Judge Breyer was on it, in an attempt to speed the selection process up.

Mr. Cutler tried to avoid the politicization of the process the second time. During the first vacancy, many names were floated and leaked, mostly to appease various constituencies. Although the initial idea was to prevent this from occurring the second time, it did take place, although to a lesser degree, because the selection was made in half of the amount of time it took to choose a nominee the first time.

In the confirmation of Justice Ginsburg, our office consulted over 75 attorneys, a list is attached, as well as outside groups such as the Alliance for Justice, Reporters Committee for Freedom of the Press, and the ABA. Additionally, numerous members of Congress were consulted, more so for the selection of Breyer than for Ginsburg. It is unclear when the consultations began, however, it is clear that names were floated during the selection process to individuals outside of the White House.

Additional consultations were made at the Department of Justice. The Attorney General was consulted in the selection as well her Deputy, Jamie Gorelick. I have attached the memo from Lloyd to the President discussing one of the meetings he had with them on this issue.

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Vetting

There is no clear indication of when the vetting of the candidates began. There is a tremendous amount of material created for each candidate after they were selected. We have no documentation of exactly when the FBI background investigation was launched for Justice Ginsburg, but, I believe the investigation was launched immediately following her nomination. I have exhausted all possible ways we could obtain the information however, we could obtain the date the investigation was launched by asking the FBI.

Justice Breyer's FBI background investigation was initiated 4 days after he was nominated by the President indicating he began work on the forms prior to his announcement. However, Breyer and Ginsburg were sitting federal judges with previously completed background investigation files that may have been accessed earlier on in the process. That information also can be obtained through inquiring with the FBI.

Questionnaire

The Senate Judiciary Questionnaire we use for all of our Article III judicial nominees was the form used here. The Committee form was received by Justice Ginsburg on June 26, 1993, 12 days after her nomination and returned to the Committee July 1, 1993. Justice Breyer's forms were completed within a few days of his nomination. Both Ginsburg and Breyer had filled out Senate questionnaires when they were nominated by President Carter.

Committee Rules

The committee rules for Supreme Court nominees, as noted by Mr. Cutler, state that a candidate's hearing can not be held within 8 weeks of their nomination unless the Committee chooses to waive the rule. The Committee waived the rule for Justice Breyer, whose hearings began seven weeks after his nomination.

Additionally, in Justice Ginsburg's materials, there is another rule noted that states that three weeks must elapse between the time the questionnaire is returned to the Committee and the time the hearings begin. This is a loose rule and can be waived by the Chairman and Ranking Member in the interests of speed.

Logistical Concerns and Personnel Requirements

The team set up video viewing for the nominee to watch previous confirmation hearings, held mock hearings, arranged transportation, and had refreshments available throughout the process. The team was given space at the Senate near the hearing room and had a war room in the OEOB. Introducers, witnesses, and media were all concerns addressed and organized by the confirmation team early on in the process.

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The confirmation team consisted of members from the Counsel's Office, Legislative Affairs, Communications, the Press Office, Office of Public Liaison, a coordinator from the Department of Justice and four outside lawyers and consultants. The confirmations team's office was staffed with a coordinator from the Counsel's Office, a detailee secretary from the Department of Justice, and a full time intern. They did note that more hard working eager interns would be more helpful than the secretary. Each team had 15 or so members, with 4 or 5 being brought on board specifically to work on the nomination and confirmation.

Other Concerns

There are a other issues that you may want to take into consideration at this stage in the process. First, if Justice Stevens resigns, a statement would need to be issued by the President within hours of receipt of the resignation. Depending on what format it is received in, the two routes for this are the public ceremony done with Justice Blackmun, or, as was done for Justice White, a two paragraph statement released from the President along with his resignation letter. If a resignation is sudden, there would be little time to prepare a response.

Second, there was a large team created to prepare the nominee and handle the numerous issues, inquiries, and preparation surrounding the nomination. A confirmation team was created and Justice Breyer was given an office to use in the White House complex. I have attached the schedule that our office prepared for him to follow in his preparation efforts as an example of how much time was spent with him during those seven weeks. Additionally, binders on many topics were created, bound, and delivered to numerous individuals and members for review of his qualifications. I have kept all of the relevant material used in nomination process of both Ginsburg and Breyer which totals some 30 boxes.

Third, Mr. Cutler gave a press conference immediately following the ceremony for Justice Blackmun. There was no ceremony or press conference by Mr. Nussbaum following Justice White's retirement announcement. Justice White's resignation letter to the President was released along with a brief statement from the President.

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Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. list	re: Ginsburg Confirmation Team (partial) (2 pages)	08/08/1993	P6/b(6)
002. list	re: Confirmation Team Phone List (1 page)	n.d.	P6/b(6)
003. schedule	re: Schedule for 10 Days Before Hearings - Ruth Bader Ginsburg (partial) (1 page)	08/20/1993	P6/b(6)
004. list	re: List of Those Who Helped - Hearings of Ruth Bader Ginsburg (partial) (2 pages)	08/05/1993	P6/b(6)
005. agenda	re: Meeting (partial) (1 page)	07/15/1993	P6/b(6)
006. schedule	re: Schedule for Ruth Bader Ginsburg (partial) (1 page)	07/09/1993	P6/b(6)
007. notes	re: Notes from Meeting (partial) (1 page)	06/29/1993	P6/b(6)
008. notes	Notes from Meeting of June 25, 1993 (2 pages)	06/25/1993	P5 6486

COLLECTION:
Clinton Presidential Records
Counsel's Office
Cliff Sloan
OA/Box Number: 4263

FOLDER TITLE:
[Loose Material Re: Ginsburg] [unfoldered]

2006-1067-F
jp2230

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
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b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

MS

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Notes from meeting of ~~July~~ June 25, 1993

Berman, Greenfeld, Klain, Klein, Seidman

Space/ Administrative

There is now office space in OEOB 566, 456-2156, 2695, fax 456-6519. Helaine Greenfeld will be the coordinator, and by Monday there will be a secretary from Justice, Martha Jackson. Helaine will compile and circulate a list of home, office and vacation phone numbers.

Briefings with law professors and mock hearings will be held in Room 180 OEOB.

Courtesy Calls

Ron reported that RBG has seen all the senators on the Judiciary Committee except Specter and about 12 others off the committee. Monday she has plans to see Congressmen Brooks, Fish and Edwards. So far the only follow up meeting that looks necessary is with Metzenbaum to further discuss issues of Roe, Antitrust and a few opinions on which he questioned Bork that RBG joined as well. Helaine will keep a schedule of the courtesy calls and a list of those already completed. Notes from the courtesy calls so far will be gathered from Ricki and Susan and compiled by Ron.

Video Tapes

Tapes of previous hearings are being gathered by Collier in Ricki's office and will be in Room 566 as they come in.

Briefing Materials from Previous Nominees

This material is being copied by Justice and will be sent over to Joel today.

Preparation Team

Ron suggested adding someone from Public Liaison to work with Ricki on police groups and other similar constituencies.

Joel said that the group of lawyers preparing memoranda should be finishing today and that all will be complete by Monday. This includes both the 2 page memos and the longer, more comprehensive materials. When they are finished, a set will be sent around to everyone unless they tell Helaine it isn't necessary.

Faculty Briefings

Joel reported on the academics being enlisted to brief RBG on a variety of subjects. So far they include (with apologies on the spellings):

- o Antitrust/ Communications - Tom Krattenmaker (Georgetown)
- o Criminal Law - Jerry Lynch (Columbia)
- o Administrative Law - David Shapiro (Harvard)
- o Religion - Martha Minnow (Harvard)

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- o 1st amendment - Geoffrey Stone (Chicago)
- o Federalism - Sue Block (Georgetown) & Vicki Jackson ? (Georgetown)
- o General Constitutional - Jerry Gunther (Stanford)
- o Civil Rights - unclear - either Burt Neuborne (NYU) or Charles Abernathy (Georgetown)
- o Property - Milton Regan (Georgetown)
- o Privacy - Sylvia Law (NYU)
- o What's New at the Supreme Court - Kathleen Sullivan (Stanford)

Ron's Visit to the Judiciary Committee

Ron went over what he sees as the 6 major areas of focus in the hearings:

1) Death Penalty/ Crime/ Habeas Corpus
2) Gay Rights
3) Madison Lectures
4) ACLU (membership/ involvement)
5) Takings/ Property/ Environmental
6) Labor/ Consumer/ Antitrust

Ron hopes to get the Judiciary Committee questionnaire by today, after which we will begin compiling all of the necessary documents and opinions. We decided that any per curiam decisions she has authored should not be included.

Ron also reported that he has gotten the committee to agree to 2 minute openings by all the members except Biden and Hatch, and that he is close to an agreement on only two 30 minute rounds of questioning.

There will be a meeting at 2 pm on July 1st with the Democratic staff members of the committee.

Mock Hearings

It was decided that before the mock hearings it would be useful to set aside a half day to prepare for the preparation and do some Q&A with RBG. Ron and Joel volunteered to do the questioning.

Next Meeting

The next meeting will be Tuesday, June 29th at 9:30 a.m. in 125 OEOB.

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Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Committee Questioning (9 pages)	07/12/1993	P5 6487

COLLECTION:
Clinton Presidential Records
Legislative Affairs
Donnie Fowler
OA/Box Number: 5716

FOLDER TITLE:
Judge Ginsburg [1]

2006-1067-F
jp3232

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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FILE: GINSBURG 6487

July 12, 1993

MEMORANDUM FOR HOWARD PASTER

FROM: RON KLAIN

SUBJECT: LIKELY AREAS OF COMMITTEE QUESTIONING

Here are the likely areas of Judiciary Committee questioning, based on information obtained in her courtesy calls, our subsequent contacts with staff and Senators, and prior Judiciary hearings.

Below I list close to 100 areas of questioning planned by the Senators, covering about 50 different topics.

Chairman Biden

(1) **Interpretative Theory:** General questions on method, based largely on the Madison Lectures. (Difference between approach to gender, race cases as articulated there.) Views on Scalia's footnote six in Michael H.

(2) **Unenumerated Rights/Right to Privacy:** From Harlan in Poe to Roe; constitutional basis for the right to privacy; how RBG interprets the liberty clause of the 14th Amendment.

(3) **Right to Die:** Possible questioning on this application of privacy cases; how would RBG approach this issue?

(4) **Separation of Powers:** RBG's view on this; her dissent in In re Sealed Case; her views on Chevron deference.

(5) **Freedom of Speech:** Basic doctrinal issues; RBG cases; views on major precedents: e.g., NYT v. Sullivan, Brandenberg.

(6) **Free Exercise:** Smith and progeny; RBG views on Smith (akin to Souter).

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Senator Hatch

(1) **Judicial Activism vs. Restraint:** Is Ginsburg a moderate in substance, or just style? Is her reputation for restraint undeserved, as a product of her place on a court bound by precedent? Is she a closet activist?

(2) **Specific Cases:** Two are being studied -- Horhi, as evidence of RBG's "activism;" and Ross, a "soft-on-crime" and "activist" case.

(3) **Crime and Criminal Procedure:** Constitutionality of the death penalty; habeas corpus reform; constitutional status of Miranda and the Exclusionary Rule.

(4) **Religious Freedom:** Hatch is critical of Smith; will seek answers similar to Souter's on this topic.

(5) **Vetters:** RBG's experience with outside vetters; confirmation helpers; conflicts of interest and recusals.

(6) **Affirmative Action:** Do "benign" classifications get strict scrutiny? Does RBG stand by her Bakke brief? What are the "other justifications" (beyond remedial) that RBG was referring to in O'Donnell to justify set asides?

Senator Kennedy

(1) **Civil Rights:** RBG's views on remedies and affirmative action; equal protection and race; Croson and progeny.

(2) **Voting Rights:** Recent Shaw decision -- under what circumstances can race be used in districting? Views on Presley may also come up.

(3) **Abortion Rights:** General questions; also, views on Bray and abortion-clinic protection legislation.

(4) **Section Five:** RBG's views of Congress' power under Section Five of the Fourteenth Amendment; extent to power to remedy discrimination (cf. Croson, Metro Broadcasting); extent of power to enact legislation like FoCA.

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Senator Thurmond

(1) **Death Penalty:** Is it constitutional? Constitutionality of non-homicidal death penalty; racial discrimination and the use of statistics to challenge this penalty.

(2) **Habeas Corpus Reform/Finality:** Agreement with Teague, Butler; general problem of a lack of finality in capital cases; views on legislative reforms.

(3) **Gay Rights:** Bowers; gays in the military; equal protection for gays; affirmative action for gays.

(4) **ACLU Generally:** Attack on controversial ACLU policies and any RBG connections to them.

(5) **Second Amendment:** Does RBG support it? To what extent does it guarantee rights for individual gun owners? (May attack ACLU policy?)

(6) **Tenth Amendment:** General support for states' rights; How does RBG interpret the Tenth Amendment?

(7) **Obscenity:** General doctrinal issues and the power of Congress to regulate indecent speech.

Senator Metzenbaum

(1) **Abortion Rights:** RBG's views generally; The Madison Lectures and RBG's editorial modifications; access issues; Casey; public funding.

(2) **Antitrust:** Overall approach; controversial RBG decisions on Court of Appeals; views on resale price maintenance; role of economics in antitrust.

(3) **Labor Issues:** RBG decisions that have been criticized by labor groups; RBG's views on union cases generally.

(4) **Access to the Courts:** RBG standing cases; RBG private-right of action cases; RBG's response to charge that she uses "technical" barriers to keep persons from court.

(5) **Equal Protection - Gender:** Did RBG back away from strict scrutiny for women in the Madison Lectures?

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Senator Simpson

(1) **Abuse of Asylum:** What limits does Due Process place on government's ability to end abusive claims of asylum? Does Constitution require us to let undocumented aliens "run free" in the U.S.?

(2) **Confirmation Process:** RBG's views of the process? Her Illinois law review article? RBG's criticisms of the attacks on Judge Bork?

(3) **Selection Process/Litmus Tests:** What questions was RBG asked by vetters, White House, or the President? Were litmus tests applied?

(4) **Gay Rights:** Are the analogies between the gay rights movement and the civil rights movement fitting? Should blacks be upset about use, by gays, of their rhetoric?

(5) **RBG Role on Court as a Woman:** How does RBG see her role on the Court, as a woman? (Comparison to Justice Marshall's special role on race issues.)

(6) **Race v. Gender:** What are differences in equal protection analysis in these two areas? What gender distinctions would be invalid, that would be invalid if based on race?

(7) **Freedom of Speech:** RBG's views generally; RBG's vote with judge Bork in Evans v. Ollman.

Senator DeConcini

(1) **Gender and Equal Protection:** RBG's approach in general; levels of scrutiny; RBG's view of Stevens' approach; practical applications of strict scrutiny for gender. [This will dominate DeConcini's questioning.]

(2) **ERA:** Does RBG believe an ERA is still needed? How does she reconcile her political view that ERA is needed, with her legal view that strict scrutiny is the rule under the Equal Protection Clause?

(3) **Asset Forfeiture:** What is RBG's view of recent Supreme Court cases in this area? Does she agree that the Eighth Amendment applies to this civil sanction?

(4) **Race and Equal Protection:** DeConcini is likely to ask some questions of concern to Hispanics -- i.e., Do RBG's views on race, which seem largely to concern the historical problems faced by blacks, encompass an understanding of the plight of Hispanics?

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Senator Grassley

(1) **Property Rights:** When do environmental laws (e.g., wetlands regulation) go to far? Is the rule complete deprivation of value, or something short of that?

(2) **Victims' Rights:** What is RBG's view on "victims rights"? What about victim impact statements (Booth)?

(3) **Judicial Activism:** Is RBG an activist? Does she accept the idea of "original intent?" What is her view on stare decisis?

(4) **Statutory Interpretation/Legislative History:** Does RBG accept Scalia's view on legislative history (Grassley does not)? What is her approach?

(5) **Ninth Amendment:** What is the meaning of the "forgotten Ninth Amendment"?

(6) **Tenth Amendment:** Does it have any teeth in insuring federalism? What about "states' rights"?

Senator Leahy

(1) **Freedom of Speech:** Basic doctrinal issues; RBG cases (Evans, CCNV).

(2) **Free Exercise:** RBG views on Smith; will RBG criticize it as Souter did?.

(3) **Establishment Clause:** RBG's views on the Lemon test? Does she agree with the Jeffersonian "wall" metaphor?

(4) **Abortion Rights:** RBG's views generally; her awareness of the special problems of women in rural areas.

(5) **Freedom of Information:** RBG's views on FOIA; Leahy is a strong FOIA booster and will press on any "anti-FOIA" decisions by RBG.

(6) **New Technology and Freedom:** Leahy may also ask some general questions about how the Constitution "grows" to deal with new issues raised by new technology (e.g., digital telephony).

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Senator Specter

(1) **War Powers:** Is the War Powers Act constitutional? Was the Korean War a constitutional war? If not, should the Court have declared it as such? What is RBG's view of the allocation of powers in this area between the President and the Congress?

(2) **Free Speech:** May seek RBG's views on Brandenberg, or other speech cases. Will ask some questions seeking to ascertain her general approach to the doctrine.

(3) **Establishment Clause:** How RBG views the Lemon test? How to make sense of the subtle lines in the Court's jurisprudence?

(4) **Affirmative Action:** When are race-conscious remedies permissible? What did RBG mean in her concurrence in O'Donnell?

(5) **Jewish Seat:** How does RBG feel to be taking the "Jewish seat"? Does she see herself as having a special role or responsibility in this regard?

Senator Heflin

(1) **Abortion - Madison Lectures:** What are RBG's views generally on abortion? What is her view of Roe? What was she trying to say in the Madison Lectures?

(2) **Wright v. Regan:** What was the basis of RBG's opinion in this case? Why was she reversed by the Supreme Court? What are her views on standing generally?

(3) **Dronenberg:** What was the basis for RBG's separate opinion? Was she expressing a view on the underlying constitutional question? Why did she criticized Bork's opinion in the case, but later defend it in a speech?

(4) **Relations between Courts and Congress:** RBG's views on what Congress can do to improve relations? RBG's views on reform proposals, such as Federal Courts Study Commission (Heflin was a member)?

(5) **Statutory Interpretation:** RBG's approach; her application of Chevron deference; her use of legislative history?

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Senator Brown

(1) **Property Rights:** Does RBG regard them as fundamental? How do they compare to "personal" rights, such as abortion and contraception? What about a case like Moore, where the two are bound together? When is a regulation a taking?

(2) **RBG's Speech at 8th Circuit Conference:** RBG's views on "originalism"? What is her judicial philosophy, at a general level? What limits her "activism," if not fidelity to original intent?

(3) **Freedom of Speech/Obscenity:** What restrictions, if any, are permissible on speech in the field of obscene speech? RBG's views on the Pornography Victims Compensation Act?

(4) **ACLU Activities:** What was RBG's role in the organization? What is RBG's views of its more controversial policies?

(5) **Strict Scrutiny - Gender:** What distinctions between men and women would RBG uphold? What, if any, are legitimate? And how does this view square with use of strict scrutiny in race area?

(6) **Apply Laws to Congress:** May ask RBG about her comment about the applicability of general laws to Congress (e.g., Title VII); Brown is a critic of Congress' self-exemption.

Senator Simon

(1) **Sensitivity:** Is RBG sensitive to the problems of those who have lived different lives from hers? Ever visited an Indian reservation? Does she care about "little people"?

(2) **Stare Decisis:** What is RBG's approach? When does she defer to precedent; when will she reject them?

(3) **RBG and Bork:** Why did she agree with him so often? What is her response to 1987 Legal Times analysis on rate of agreement?

(4) **Civil Rights:** Does RBG care about civil rights? What are her views about race relations?

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Senator Pressler

(1) **Indian Jurisdiction:** Tribal jurisdiction over non-Indians; Duro; quality of tribal courts; when can Indians go into federal court? Criminal jurisdiction on Indian lands (can whites be tried in Indian courts)?

(2) **Non-Indian Rights:** Rights of non-Indians on Indian lands (e.g., hunting and fishing rights)? Rights of whites to be tried in non-Indian courts?

(3) **Water Rights:** How can RBG, as Easterner, understand West's complex water rights cases? (These were Justice White's specialty).

(4) **Regulatory Takings:** When does mining regulation effectuate a taking? Is the rule complete deprivation of value, or something short of that?

(5) **Agricultural Antitrust:** What about the agricultural antitrust exemption?

(6) **Victims' Rights:** What is RBG's view on "victims rights"? What can be done to limit "criminals' rights"?

(7) **States' Rights:** What is the scope of state power to regulate abortion, under Planned Parenthood? What is RBG's view? What about under the Freedom of Choice Act?

Senator Kohl

(1) **Personal Questions:** Why does RBG want the job? What does she bring to it? Does she have a "big heart"?

(2) **Preparation:** What was the role of DoJ, the White House, and outsiders in her preparation? What conflicts of interest are created? What recusals will result?

(3) **Consensus Builder:** Is RBG a consensus builder? How does she do it as a quiet person? Response to Dershowitz's attacks on RBG?

(4) **Overall Philosophy:** How does RBG describe herself? As a "centrist"? As a "pragmatist"?

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Senator Cohen

(1) **Independent Counsel:** RBG's dissent in In Re Sealed Case; Cohen is Senate sponsor of Independent Counsel law.

(2) **Goldman Case:** RBG's views on religious freedom in the military; views on Free Exercise generally.

(3) **Right to Privacy:** Where does RBG find it? What are its roots? What are its full implications?

(4) **Race Relations:** What is the role of law in promoting racial healing? RBG's views on the state of race relations in the U.S. today?

Senator Feinstein

(1) **Gay Rights:** Feinstein supports gay rights; may question Ginsburg on Dronenberg or general constitutional issue.

(2) **Death Penalty:** Feinstein supports death penalty; concerned about Ginsburg's opposition (or even neutrality) to it; other "ACLU-crime" questions.

(3) **Abortion Rights:** Feinstein supports abortion rights; concerned about Ginsburg's criticisms of Roe.

(4) **ACLU Ties:** Feinstein is concerned about these; wants Ginsburg to distance herself.

Senator Mosely-Braun

(1) **Civil Rights:** Is RBG committed? Review of discussion of Brown and Loving in Madison Lectures? Affirmative action and permissible use of set-asides? [Failure to hire black law clerks?]

(2) **Free Speech:** RBG's views on "cutting edge" issues and cases; hate crimes and speech codes; other "new" issues in free speech jurisprudence.

(3) **Abortion Rights:** Wouldn't RBG's "gradualist" approach to Roe have hurt poor women? RBG's views on restrictions (e.g., waiting periods) that hurt rural and poor women.

(4) **Court as Leader:** What does RBG's criticism of the Court as being "too far ahead" of the country mean in the Madison Lecture?

(07/12/93 -- 10:10)

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Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001a. letter	Stephen Breyer to R.A. Page; re: Syndicate 418 (1 page)	04/27/1992	P6/b(6)
001b. letter	D.G.L. Mott to Stephen Breyer; re: 1985 Underwriting Account (1 page)	06/24/1988	P6/b(6)
001c. statement	re: Oxford Members' Agency Ltd. - 1985 Underwriting Account - Stephen G. Breyer (1 page)	06/24/1988	P6/b(6)
001d. letter	B.R. Hayter to Stephen Breyer; re: Personal Stop Loss Insurance - 1985 (1 page)	07/20/1988	P6/b(6)
002. form	re: Travel Voucher for Justices & Judges of the United States - Sitting with Court in Puerto Rico - Stephen G. Breyer (partial) (3 pages)	03/13/1991	P6/b(6)
003. letter	Daniel Foley to Joanna Breyer; re: Household Help [2 copies] (2 pages)	09/27/1993	P6/b(6)
004. memo	To Beth Nolan; re: Tax Check Report [2 copies] (2 pages)	07/06/1994	P6/b(6)
005. form	re: Travel Voucher for Justices & Judges of the United States - Sitting with Court in Puerto Rico - Stephen G.Breyer (partial) (3 pages)	03/13/1991	P6/b(6)
006. schedule	re: Schedule of Collections - Stephen G. Breyer (partial) (1 page)	06/07/1994	P6/b(6)
007. list	To Do List (2 pages)	ca. 7/1994	P5
008. list	Requests by and Information From (1 page)	ca. 7/1994	P5

6488
6489

COLLECTION:
Clinton Presidential Records
Counsel's Office

OA/Box Number: 3915

FOLDER TITLE:
[Stephen Gerald Breyer Document Index] [4]

2006-1067-F
jp2283

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
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62580

ARCHIVES JONES

C-SPAN VIEWER INFO

TO DO LIST

1. Obtain and prepare Ginsburg tape. (Susan)

2. Preparation for hearings

   a. Prepare package of recent Supreme Court opinions (including Tigar, Kirias Joel and recent voting rights cases)

      i. Memorandum (Don)
      ii. Cases (~~Neera~~) DON

   b. Obtain definitive statement on substantive due process issue.

      ~~i. Locate Scalia's "oxymoron" dissent (Brands/Neera)~~
      ~~ii. Locate Michael H., fn 6 (Neera)~~
      iii. Prepare review of writings (~~Don~~) HANK

   c. Items mentioned by Specter.

3. Finalize case notebooks for SB. (Don)

4. Finalize SB's opening statement.

   a. Circulate draft to confirmation team Tuesday (7/5/94)

   b. Find out appropriate length of opening statement (Susan)

   c. Schedule more time for practice?? (Now only Thursday a.m.)

   ~~d. Finish inserts on particular subjects (Don)~~

5. Do final review of SB's writings (Verrilli)

6. Revise sales book. (LAURA)

   a. Locate clean copies of Clinton and SB's Rose Garden statements (Jason)
   b. Review support letters for inclusion in book (Susan/Preeta)
   c. Amend list of quotes (Susan/Preeta)

7. Preparation for mock hearings

   a. Meld who's who list and agenda onto one sheet (Susan)
   b. Get remaining materials to mock senators (Laura)

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8. Respond to questions/concerns of Judiciary Committee and Senators

a. Charitable contributions question by Metzenbaum (Susan)
b. New Life Baptist Church case issue by Kassebaum and Campbell (Don)
c. Travel vouchers (1991-1994) (Susan)

9. Preparation for questions/concerns of individual Senators

a. Organize files (Cliff)
b. Outreach (Preeta)

10. Planning logistics for hearing

a. Conference room (Susan/Mike Berman)
b. Food (Susan/Mike Berman)
~~c. Passes (Susan/Mike Berman)~~
d. Determine space availability at hearing (Susan)
e. Advance Person ← → Walk-through 2 pm

11. Coordinate press operation (Cliff)

a. Name spokesperson (Cliff/Joel)
b. Organize commentators (Arthur Jones)
   i. A.E. Dick Howard (Agreed to do)
   ii. Susan Low Bloch (Agreed to do)
   iii. Bob Potofsky (Agreed to do)
c. Organize appearances by other commentators (Lloyd Cutler, Peter Edelman, Chris Edley, Joel Klein and Sally Katzen(?))
d. Arrange gavel-to-gavel coverage by WHCA

12. Prepare supportive witness list (Susan/Laura)

13. Get Airline De-Regulation Rpts + Send To Alfred Kahn. (Laura)

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REQUESTS BY AND INFORMATION FROM KATHY RUSSELL

1. On Page 18 of SB's questionaire, the article "Relationship of Science, Law and Policy in Risk Assessment and Management", Interrelationship of Toxicology and Law for Human Safety Evaluation 163 (April 1984) is mentioned, but no text is available. Is there any copy available? REQUEST MADE TO LIBRARY NAT'L MED. LIBR

2. A Boston Globe article suggested that SB's profits from Zolle Med stock ($15-50k) were fishy. Get explanation from SB or assistant.

3. Provide only Puerto Rico travel voucher (in which SB made reimbursements). Send memo explaining reimbursements. DON'T send any other travel vouchers. SEE'Y SAID FINAL MEMO.

FINAL 4. What is the status of the IRS tax check? SHOULD GET WED. AM. PER PEGGY.

5. Get a copy from Cheryl of the IRS opinion on SB's housekeeper tax situation. LM W CHERYL 7-5-94

6. There will be a closed session next Wednesday, beginning at 9 AM. The committee will reconvene at 1 PM.

7. Senate staff is working on a room for us.

8. SB may do a walk-through next Monday. Let the staff know what time. 2 PM

9. Let staff know who are witnesses will be. The committee is allowing Nader to testify. There has been a request from five minority groups to testify. The committee will probably grant the request and they will comprise one panel. There has also been a request from a home-schooling group to testify which may also be granted. SUSAN

10. Reference is made to a National Academy of Sciences article on saccharine. Is that article available?

11. The committee wants a briefing on Lloyd's tomorrow and one on financial matters on Thursday.

12. 40 SEATS.

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Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memos	re: Memorandums of [Telephone] Calls for Judge Stephen Breyer (partial) (1 page)	07/11/1994	P6/b(6)
002. memo	Preeta Bansal to Clifford Sloan re: Supplementary (3 pages)	07/11/1994	P5 6490
003. memo	To Honorable Carol Moseley-Braun (9 pages)	06/30/1994	P5 6491

COLLECTION:
Clinton Presidential Records
Counsel's Office

OA/Box Number: 3915

FOLDER TITLE:
[Breyer Documents] [2]

2006-1067-F
jp2300

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

6490

July 11, 1994

MEMORANDUM

To: Clifford M. Sloan

From: Preeta D. Bansal

Re: Supplementary Potential Questions for Breyer Hearings

As an update to my July 7 memorandum, the following are additional areas likely to be pursued by particular Senators at Judge Breyer's hearings:

Grassley: (M. Patack)

- Statutory construction, with reference to Judge's decisions in Maravilla, 907 F.2d 216, and Paleo (and Custis)
- Views on judicial activism by specific questioning of views on the following cases:
  - Clymer v. Bureau of Police, 765 F. Supp. 181, rev'd, 958 F.2d 1242? (3rd Cir.)
  - Young v. NYC Transit Auth., 729 F. Supp. 341, rev'd, 903 F.2d 146 (2d Cir.) (panhandling)
  - Loper v. NYPD, 802 F. Supp. 1029
- Legislative Veto and Chadha
- Use of legislative history, with reference to recent S.Ct. decision on retroactivity of Civil Rights Act
- Equal protection, with reference to:
  - Levey v. Louisiana, 391 U.S. 68
  - Glona v. American Guarantee, 391 U.S. 73
  - Labine v. Vincent, 401 U.S. 532
  - Webber v. Aetna, 406 U.S. 164
  - Gomez v. Perez, 409 U.S. 535
  - NJ Welfare Org. v. Cahill, 411 U.S. 619
  - Trimble v. Gordon, 430 U.S. 762
  - Lalli v. Lalli, 439 U.S. 259
  - Parham v. Hughes, 441 U.S. 347

Kohl: (J. Chorowsky)

- Open-ended questions about judicial role
- Regulation of television violence/First Amendment
- Views on use of confidentiality by courts in civil cases (through sealing and secrecy orders): balancing litigants' rights vs. need for openness and disclosure to public of potential health and safety hazards

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DeConcini: (M. O'Leary)

Miranda, Fourth Amendment, and Criminal Procedure
8th Amendment and "evolving standards of decency"
Right of Privacy
Judicial activism
Judicial temperament
Use of legislative history
Experience on Sentencing Commission and views of current criticisms of guidelines
Original intent
Equal protection

Heflin: (J. Whitten)

Griswold and privacy
Judicial restraint
Predatory pricing (Barry Wright v. ITT)
Various questions about your books and Posner book review about role of economic analysis vs. preserving human values
Antitrust: how to preserve fairness/small competitors
Use of legislative history
Religion (Alexander v. Boston Univ. and New Life Baptist)
Is there a constructive role for dissenting opinions, or is consensus the overriding value?

Moseley-Braun: (P. Smith)

Voting rights (Latino Political Action Comm. v. Boston and S.Ct. recent decisions in Pressley and Shaw v. Reno)
Use of legislative history (and particularly whether recent SCt voting rights decision got it right)
Fourth Amendment (weapons sweeps in housing projects such as the Chicago Housing Auth.)
Allocation of judicial resources (how to address vast increase in court filings)
Need for champion of the little person on Court
Right of informational privacy in this age of the superhighway, with reference to Judge's lip-service to this right in Dorey v. Smith
Additional questions on sentencing attached

Feinstein: (A. Eisgrau)

Wants Breyer's views on reproductive choice and the death penalty in bottom-line/layman terms

Pressler: (D. Feldhaus)

Death Penalty/Habeas reform
Exclusionary rule
Demands that the nominee have some familiarity with current issues in Native American law
Possible questions on airline deregulation

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Hatch: (E. Whelan)	In addition to his other questions, he will ask about Judge's 1970 article on copyright protection for software (there are many software companies in Utah) -- wants assurance that Judge will "apply the law" and grant copyright protection to software, where prescribed.
Cohen: (K. Corthell)	Fourth Amendment (Berryman) Sentencing/mandatory minimums Habeas reform Religion cases (New Life Baptist) Administrative law (DaConceicao Rodriguez v. INS)
Thurmond: (T. Strom)	Criminal law enforcement Judicial activism Death Penalty/McCleskey v. Kemp Antitrust and regulatory reform
Simpson: (D. Day)	Home Schooling & recent RIFRA legislation
Simon: (J. Jerkins)	First Amendment/establishment clause (Lemon test) Access to the courts

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JUN 30 94 15:45 [illegible] 1ST CIRCUIT CT

6491

MEMORANDUM

June 30, 1994

TO: Honorable Carol Moseley-Braun

FROM:

Re: Possible Questions for Judge Breyer on the Sentencing Guidelines

1. In United States v. Rivera, you modified the standard of review to be applied by appellate courts when

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reviewing a trial court's decision to depart from the Sentencing Guidelines. You held that in situations in which the trial court departed from the Guidelines on the basis of a case's "unusualness," the appellate court should not review this decision as a matter of law, as required by earlier case law in your circuit. Rather, you wrote that such determinations of "unusualness" should be considered on appeal with "full awareness of,

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and respect for, the trier's superior 'feel' for the case." My questions for you are:

(a) What prompted the decision to change the standard of review in Rivera? Was Rivera a recognition that the First Circuit had previously misinterpreted the dictates of the Sentencing Reform Act?

(b) How does Rivera fit with your notions of stare decisis?

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(c) Does Rivera tell us anything about your judicial philosophy?

2. You have noted in your judicial opinions that the Sentencing Guidelines embody a "theory of partnership" among the trial courts, the appellate courts, and the Sentencing Commission. This "partnership" operates, from what I can understand, by having the trial courts explain the specific reasons for

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their decisions to depart from the Guidelines, by having the appellate courts review these decisions in the context of shaping a coherent sentencing law, and by having the Sentencing Commission gather the information generated by these courts so that it can produce a more consistent and equitable sentencing system. My questions for you are:

(a) Are there any other ways in which the members of this "partner-

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ship" may communicate in order to address perceived difficulties with the Guidelines, or would such communications be constrained by the doctrine of separation of powers?

(b) Is there any way that the courts can bring the decisions of prosecutors into this "partnership," or otherwise make prosecutors' decisions more visible? (As you know, a recurrent criticism of the Guidelines is that they vest

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too much of the sentencing authority with the prosecutor. It is the prosecutor, for example, who makes the off-the-record decision of whether to charge a defendant under a statute containing a mandatory minimum, or whether to move for a departure in recognition of a defendant's substantial assistance.)

3. In your early writings on the Guidelines, you posed the question

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of whether the "game is worth the candle." In 1989, the American Criminal Law Review quoted you as answering this question in the affirmative, partly because: "[T]he new law will force a change in the focus of the criminal justice system. Instead of asking almost exclusively, 'Did this person commit the crime?' judges and courts will begin to ask, more systematically, 'What should we be doing with

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this offender, this human being.'" My questions for you are:

(a) Has this change in focus occurred?

(b) If yes, how so? If not, will it ever occur under the current system?

(c) Has the game, in fact, been worth the candle? If not, will it ever be?

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Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Christopher Cerf to Cliff Sloan re: Lloyd's Documents (2 pages)	07/11/1994	P5 6492

COLLECTION:
Clinton Presidential Records
Counsel's Office
Cliff Sloan
OA/Box Number: 4644

FOLDER TITLE:
Breyer - Miscellaneous [Folder 1] [5]

2006-1067-F
ds400

RESTRICTION CODES

Presidential Records Act - |44 U.S.C. 2204(a)|

P1 National Security Classified Information |(a)(1) of the PRA|
P2 Relating to the appointment to Federal office |(a)(2) of the PRA|
P3 Release would violate a Federal statute |(a)(3) of the PRA|
P4 Release would disclose trade secrets or confidential commercial or financial information |(a)(4) of the PRA|
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors |a)(5) of the PRA|
P6 Release would constitute a clearly unwarranted invasion of personal privacy |(a)(6) of the PRA|

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - |5 U.S.C. 552(b)|

b(1) National security classified information |(b)(1) of the FOIA|
b(2) Release would disclose internal personnel rules and practices of an agency |(b)(2) of the FOIA|
b(3) Release would violate a Federal statute |(b)(3) of the FOIA|
b(4) Release would disclose trade secrets or confidential or financial information |(b)(4) of the FOIA|
b(6) Release would constitute a clearly unwarranted invasion of personal privacy |(b)(6) of the FOIA|
b(7) Release would disclose information compiled for law enforcement purposes |(b)(7) of the FOIA|
b(8) Release would disclose information concerning the regulation of financial institutions |(b)(8) of the FOIA|
b(9) Release would disclose geological or geophysical information concerning wells |(b)(9) of the FOIA|

6492

July 11, 1994

TO: CLIFF SLOAN

FROM: CHRISTOPHER CERF

RE: LLOYD'S DOCUMENTS

By rule and convention, a Lloyds syndicate closes at end of its third year. Especially with the advent of "occurrence" based policies, it is highly unlikely that a Syndicate's entire portfolio of insured risks would be extinquished at the end of three years. To address this concern, a syndicate that is about to close typically "cedes" its remaining risk portfolio to another syndicate in exchange for a substantial premium. The the document memorializing the transaction is referred to "a run off" contract. The entire mechanism whereby one syndicate folds its remaining liabilities into another is known as Reinsurance to Close (RITC).

A basic principle of underwriting is that it is only possible to insure known (albeit unevenly distributed) risks. Accordingly, if a syndicate's risk exposure is essentially incalculable, closure is not possible: No rational party would agree to accept a boundless risk regardless of the magnitude of the premium.

In 1985, Judge Breyer became a "name" in Merritt 418/7. In that same year -- on the advice of Merritt, the Syndicate's auditor (Ernst & Whinney) and others -- Merritt 418/7 entered into approximately 10 run off contracts pursuant to which various other closing syndicates ceded their remaining risk portfolio to 418/7. (It also appears that 418/7 entered into a similar contract directly with the Fireman's Fund, presumably more in the nature of a standard reinsurance contract.) It is undisputed that substantial portions of the ceded liabilities consist of pollution- and asbestos-related exposures.

In October, 1992, a solicitor retained by a number of names rendered a lengthy legal opinion to the effect that Merritt and its auditor had breached their duty of care by entering into the run off contracts described above. Approximately a year later, after securing the consent of SB and other Names, the solicitor filed a complaint in British court. The gravamen of the complaint was (1) that by the early 1980s it was well known that CERCLA and asbestos liabilities would be of potentially catastrophic proportions; (2) that the magnitude of the exposure could not be known with any reasonable certainty; and (3) that therefore the decision of the Members Agent (on the advice of the auditor) to enter into the run off contracts breached their duty of due care.

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The the various document that led to the lawsuit (including the complaint) contain numerous statements that bear on SBG's actual or constructive knowledge of the scope of pollution-related liability. Pertinent excerpts are attached.

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Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001a. memo	Louis Lusky to POTUS et al; re: Availability of Our Nine Tribunes: The Supreme Court in Modern America (partial) (1 page)	04/30/1994	P6/b(6)
001b. letter	Walter Gellhorn to Louis Lusky; re: Analysis of Supreme Court (partial) (1 page)	05/04/1994	P6/b(6)
002. memo	Robert W. Martin to Julia M. Stasch; re: News Release from Congressman John J. Duncan - New Boston Courthouse (partial) (1 page)	05/25/1994	P6/b(6)
003. paper	re: Judge Breyer & Civil Rights/Dosability Law (partial) (3 pages)	06/21/1994	P6/b(6)
004. memo	Thomas Castleton to Clifford Sloan re: Videorecording (1 page)	06/20/1994	P5 C6493

COLLECTION:
Clinton Presidential Records
Counsel's Office
Cliff Sloan
OA/Box Number: 4642

FOLDER TITLE:
Breyer Miscellaneous [Folder 1] [4]

2006-1067-F
jp2376

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

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6493

THE WHITE HOUSE

WASHINGTON

June 20, 1994

MEMORANDUM FOR CLIFFORD M. SLOAN
ASSOCIATE COUNSEL TO THE PRESIDENT

FROM: THOMAS E. CASTLETON TC
SPECIAL ASSISTANT TO THE COUNSEL
TO THE PRESIDENT

RE: **Videorecording of Judge Breyer's Speech to the American College of Trial Lawyers**

I am attaching two items related to your question about Judge Breyer's videotaped speech in Scottsdale. The report by Neil Lewis merely mentions that a supporter submitted a videotape of the speech to the White House for review. If the factual basis for his editorial relies exclusively on Lewis' original report, Tom Oliphant's suggestion that the President actually watched the tape is unwarranted. Notably, Lewis is the only reporter disclosing details of the videorecording before the release of Oliphant's editorial. Therefore, any suggestion that review of the video itself was decisive "enough to get the President over the hump to his decision," as the editorial states, would have to originate from Oliphant's own investigative research or from his own unsupported assumptions of the process.

Oliphant apparently researched the specifics of the videorecording sufficiently to impart the details of Breyer's speech. However, any person who read printed transcripts of the Judge's speech would have enough information to provide the details in the editorial. Standing alone, Oliphant's editorial cannot claim an inside track to the President's decision-making on this subject.

Attachments

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Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001a. list	re: Persons to be Thanked by White House Only (partial) (3 pages)	n.d.	P6/b(6)
001b. list	re: Persons to be Thanked by Justice Breyer & WH Counsel (partial) (6 pages)	n.d.	P6/b(6)
002a. list	re: Persons to be Thanked by White House Only (partial) (3 pages)	n.d.	P6/b(6)
002b. list	re: Persons to be Thanked by Justice Breyer & WH Counsel (partial) (6 pages)	n.d.	P6/b(6)
003. list	re: Family (partial) (10 pages)	n.d.	P6/b(6)
004. list	re: Wilfredo Caraballo (partial) (2 pages)	n.d.	P6/b(6)
005. memo	Preeta Bansal to Clifford Sloan and Susan Davies (3 pages)	06/30/1994	P5 6494
006. memo	Preeta Bansal to Clifford Sloan re: Supplementary (3 pages)	07/11/1994	P5 6495

COLLECTION:
Clinton Presidential Records
Counsel's Office
Doug Band
OA/Box Number: 8876

FOLDER TITLE:
Breyer Confirmation Material [Folder 2] [1]

2006-1067-F
jp2480

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
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P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

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b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

6494

June 30, 1994

MEMORANDUM

To: Clifford M. Sloan/Susan Davies

From: Preeta D. Bansal

Re: Update on Potential Op-ed Writers and Panelists for Breyer Confirmation

Potential Op-Ed Writers:

- **Charles Ogletree** -- Prof. Ogletree's assistant reports that he has obtained lots of information on the Judge's civil rights record and is preparing an op-ed which he hopes to complete by the end of this week. He will forward a draft to us at that time. He will also get back to us on whether or not Judge Higginbotham is a good and likely candidate to write an op-ed praising Judge Breyer. Ogletree's assistant is Audrey Dolaro Tejada, at 617/496-2054, and Ogletree's number is 617/495-5097.

- **Susan Estrich** -- Susan is happy to write a USA Today column praising the President and Breyer, and will plan to do so next Thursday (July 7). She does not, however, want to write that it is a good thing the President has eliminated "rancor" from the confirmation process -- she joked that rancor is a good thing. But she promised to put in some good words for the President. I have faxed her a copy of the sales book, at her request.

- **Larry Tribe** -- Tribe is disinclined to write an op-ed at this time. He says that he has already been quite public in his enthusiastic support for Judge Breyer, and is concerned that being further ecstatic will lead to awkwardness since he inevitably will be arguing in front of Judge Breyer.

- **Tom Sussman** -- Sussman drafted and submitted an op-ed to the Boston Globe, which turned it down with the suggestion that it be resubmitted as a letter to the editor. Paul Noey called David Greenway, who stood by the decision not to run the piece as an op-ed. I suggested to Noey that Sussman consider rewriting the

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op-ed to focus on Breyer's work on the Judiciary Committee; Noey doubts that this will work, since the Globe seems disinclined to spend any op-ed space on the Breyer nomination, but will raise it with Sussman when Sussman returns to the country next week. Noey wonders whether Sussman should go ahead and submit the original (or rewritten) op-ed as a letter to the editor, in case the Globe declines again.

- **Doug Foy** -- Foy is disinclined to write an op-ed for many of the same reasons as Tribe, and notes that he has several cases pending in the First Circuit now and so is concerned with the ethical implications. If we get in a real bind, though, he is willing to help out.

Potential Commentators for the Hearing:

- **Dick Howard** -- Prof. Howard is willing and available to serve the Administration during the confirmation hearings in any capacity. He is happy to make himself available to the media during breaks, and notes that during the Bork and Souter hearings he provided gavel-to-gavel commentary for WETA and PBS. I have faxed him a copy of the sales book, at his request. We should get back to him as soon as we have firm dates for the hearing and a clear conception of the role he should play. His number is 304/924-3097.

- **Jeff Stone** -- Prof. Stone will be on vacation during both middle weeks in July and is not particularly interested in changing vacation plans in order to attend (or even watch on television) hearings which he says will be uneventful. He thanks you for thinking of him, though.

- **Cass Sunstein** -- Sunstein is unavailable, and notes that many law professors would feel awkward talking to the media at the Administration's behest; he thinks, though, that it might be more natural and likely if we find an academic in Washington. He suggests the following academics in the regulatory area: **Susan Block** at Georgetown (662-9063); **Don Elliot**, at Fried, Frank in D.C. (and former EPA General Counsel under Bush); **William Eskridge** at Georgetown, who Sunstein describes as a bit of a loose cannon and big talker, but very smart and good (662-9118); **Roy Schotland**, who should be sounded out on his views of Breyer (662-9098); **Tom Sargentich** at American, who is smart but a bit bookish and perhaps not the perfect media personality (885-2614); and **Peter Schuck** at Yale, who may offer the same strengths and weaknesses as Sargentich. I have not contacted any of his

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suggestions, since we haven't yet picked from among the list.

Potential Witnesses for the Hearing:

- **Lane Kirkland** -- Larry Gold doubts very seriously that Lane Kirkland himself would be willing to testify at the hearing, because Kirkland is not an attorney and would not likely want to hold himself out as being familiar with Judge Breyer's judicial record. Larry is willing, nevertheless, to raise the issue with Kirkland when Kirkland returns to the country around July 6. If we consider it politically advantageous, Larry is also willing to raise with Kirkland the possibility that he testify in place of Kirkland at the hearing. Larry wants us to get back with him on whether or not we would want him in place of Kirkland. His number is 202/637-5390.

- **Doug Foy** -- Foy will be on vacation during the hearings and so cannot attend, much as he would like to serve on a witness panel.

CLINTON LIBRARY PHOTOCOPY

6495

July 11, 1994

MEMORANDUM

To: Clifford M. Sloan

From: Preeta D. Bansal

Re: Supplementary Potential Questions for Breyer Hearings

As an update to my July 7 memorandum, the following are additional areas likely to be pursued by particular Senators at Judge Breyer's hearings:

Grassley: (M. Patack)

Statutory construction, with reference to Judge's decisions in Maravilla, 907 F.2d 216, and Paleo (and Custis)

Views on judicial activism by specific questioning of views on the following cases:

Clymer v. Bureau of Police, 765 F. Supp. 181, rev'd, 958 F.2d 1242? (3rd Cir.)

Young v. NYC Transit Auth., 729 F. Supp. 341, rev'd, 903 F.2d 146 (2d Cir.) (panhandling)

Loper v. NYPD, 802 F. Supp. 1029

Legislative Veto and Chadha

Use of legislative history, with reference to recent S.Ct. decision on retroactivity of Civil Rights Act

Equal protection, with reference to:

Levey v. Louisiana, 391 U.S. 68
Glona v. American Guarantee, 391 U.S. 73
Labine v. Vincent, 401 U.S. 532
Webber v. Aetna, 406 U.S. 164
Gomez v. Perez, 409 U.S. 535
NJ Welfare Org. v. Cahill, 411 U.S. 619
Trimble v. Gordon, 430 U.S. 762
Lalli v. Lalli, 439 U.S. 259
Parham v. Hughes, 441 U.S. 347

Kohl: (J. Chorowsky)

Open-ended questions about judicial role

Regulation of television violence/First Amendment

Views on use of confidentiality by courts in civil cases (through sealing and secrecy orders): balancing litigants' rights vs. need for openness and disclosure to public of potential health and safety hazards

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DeConcini: (M. O'Leary)

Miranda, Fourth Amendment, and Criminal Procedure
8th Amendment and "evolving standards of decency"
Right of Privacy
Judicial activism
Judicial temperament
Use of legislative history
Experience on Sentencing Commission and views of current criticisms of guidelines
Original intent
Equal protection

Heflin: (J. Whitten)

Griswold and privacy
Judicial restraint
Predatory pricing (Barry Wright v. ITT)
Various questions about your books and Posner book review about role of economic analysis vs. preserving human values
Antitrust: how to preserve fairness/small competitors
Use of legislative history
Religion (Alexander v. Boston Univ. and New Life Baptist)
Is there a constructive role for dissenting opinions, or is consensus the overriding value?

Moseley-Braun: (P. Smith)

Voting rights (Latino Political Action Comm. v. Boston and S.Ct. recent decisions in Pressley and Shaw v. Reno)
Use of legislative history (and particularly whether recent SCt voting rights decision got it right)
Fourth Amendment (weapons sweeps in housing projects such as the Chicago Housing Auth.)
Allocation of judicial resources (how to address vast increase in court filings)
Need for champion of the little person on Court
Right of informational privacy in this age of the superhighway, with reference to Judge's lip-service to this right in Dorey v. Smith
Additional questions on sentencing attached

Feinstein: (A. Eisgrau)

Wants Breyer's views on reproductive choice and the death penalty in bottom-line/layman terms

Pressler: (D. Feldhaus)

Death Penalty/Habeas reform
Exclusionary rule
Demands that the nominee have some familiarity with current issues in Native American law
Possible questions on airline deregulation

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Hatch: (E. Whelan)	In addition to his other questions, he will ask about Judge's 1970 article on copyright protection for software (there are many software companies in Utah) -- wants assurance that Judge will "apply the law" and grant copyright protection to software, where prescribed.
Cohen: (K. Corthell)	Fourth Amendment (Berryman) Sentencing/mandatory minimums Habeas reform Religion cases (New Life Baptist) Administrative law (DaConceicao Rodriguez v. INS)
Thurmond: (T. Strom)	Criminal law enforcement Judicial activism Death Penalty/McCleskey v. Kemp Antitrust and regulatory reform
Simpson: (D. Day)	Home Schooling & recent RIFRA legislation
Simon: (J. Jerkins)	First Amendment/establishment clause (Lemon test) Access to the courts

CLINTON LIBRARY PHOTOCOPY

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Thomas Castleton to Clifford Sloan re: Judge Breyer (1 page)	06/16/1994	P5

6497

COLLECTION:
Clinton Presidential Records
Counsel's Office
Cliff Sloan
OA/Box Number: 4642

FOLDER TITLE:
Breyer Miscellaneous [Folder 1] [1]

2006-1067-F
ds377

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
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b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

6497

THE WHITE HOUSE

WASHINGTON

June 16, 1994

MEMORANDUM FOR CLIFFORD SLOAN
ASSOCIATE COUNSEL TO THE PRESIDENT

FROM: THOMAS E. CASTLETON TC
SPECIAL ASSISTANT TO THE COUNSEL
TO THE PRESIDENT

RE: **Judge Breyer: Social Security Tax Issues**

The media reports dealing with the issue of Judge Breyer's back payment of Social Security taxes for a household employee illustrate some ambiguity about the amount refunded to the Judge. For example, the transcript from *This Week with David Brinkley* reflects that "the IRS ruled he wasn't liable." During the same episode, the issue was revisited in a discussion between Sam Donaldson and Senator Feinstein. In response to Donaldson's questions, the Senator flatly states that the IRS "gave [Judge Breyer] a refund for the amount he paid" in back taxes -- implying that the refund was for the total amount paid. Other news items reporting on the issue reiterate that the IRS concluded that no back payment of taxes was due. Nevertheless, these reports also fail to disclose estimates or exact figures of any resulting IRS refund.

I conducted a Lexis/Nexis search focusing on the Internal Revenue Service's (IRS) handling of Judge Breyer's payment of back taxes for his household employee. I have attached the transcripts of each item reporting on the IRS ruling and highlighted the relevant passages for your convenience.

In addition, I conducted a broader search which included items reporting on the Judge's back payments (without further elaboration of subsequent IRS action) and on the question that the Judge owed such payment in the first place (without commentary on his payment). None of the reports in these two categories is directly responsive to your inquiry, but you may find them helpful for other purposes. Like the attached reports, I have highlighted the relevant passages for ease of use.

If you would like to see those reports as well, please let me know and I will gladly provide you with copies.

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Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Susan Davies to Cliff Sloan re: Senator Leahy's Questions (1 page)	06/24/1994	P5

6498

COLLECTION:
Clinton Presidential Records
Counsel's Office
Cliff Sloan
OA/Box Number: 4641

FOLDER TITLE:
Senator's Questions: Leahy

2006-1067-F
ds378

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

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File — 6498
Senate

THE WHITE HOUSE

WASHINGTON

May 24, 1994

MEMORANDUM FOR CLIFF SLOAN

FROM: SUSAN DAVIES

SUBJECT: SENATOR LEAHY'S QUESTIONS FOR JUDGE BREYER

Jeff Blattner reports that a staffer for Senator Leahy told him the Senator was going to raise seven issues with Judge Breyer during the courtesy call tomorrow. They are:

1. writing his own opinions
2. judicial activism
3. his most important opinion
4. criminal law and the Sentencing Guidelines
5. mandatory minimums
6. the copyright article
7. free speech and religion, especially United States v. Bader and Alexander v. Trustees of Boston University

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Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION	
001. memo	Don Verrilli to Cliff Sloan re: Breyer (4 pages)	05/18/1994	P5	6499
002. memo	Jake Siewert to Cliff Sloan re: Breyer record (2 pages)	05/24/1994	P5	6500

COLLECTION:
Clinton Presidential Records
Counsel's Office
Cliff Sloan
OA/Box Number: 4641

FOLDER TITLE:
Talking Points

2006-1067-F
ds379

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
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6499

MEMORANDUM

TO: Cliff Sloan

FROM: Don Verrilli

DATE: May 18, 1994

SUBJECT: Breyer

The consumer 2-pager, as edited, is attached. I have reviewed the Donahue lecture, and am comfortable with its use. Though Breyer does say Congress would not enact the various door-closing proposals advocated by the federal courts study committee, it is also clear that he substantively disagrees with them. The quote we use is his thinking, not his surmise about Congress' thinking. In the last section, he does not advocate the English rule, but says that some form of fee-shifting approach should be considered further. Because the anti-Quayle quote is so good, and the Donahue lecture does not commit to a "loser pays" rule, I do not think there is a serious risk of getting hurt.

We still have not sourced the quote about the Quayle proposal. Breyer's chambers sent us the newspaper article in which the quote appears, and they think it is from the Globe. I am forwarding it along with this memo and the 2-pager. We ran a search of the Boston Globe database, and it did not turn up. I know you need to get the information out fast, so I thought it might be better just to send along the article, while we continue to search for its source.

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Judge Stephen Breyer and the Consumer

1. Protecting Health Care Consumers

-- Judge Breyer has consistently protected health care consumers by refusing to allow doctors and large corporations to use the law to evade reasonable controls on health care costs.

-- In an opinion that was hailed as "a victory for all older Americans," Senior Citizen News, May 1987, Judge Breyer rejected a constitutional challenge to a Massachusetts law that forbade doctors from charging Medicare patients more than the assigned fee. See Massachusetts Medical Society v. Dukakis, 815 F.2d 790 (1st Cir. 1987). In that case, Judge Breyer also upheld a state law requiring doctors to promise not to charge patients more than the Medicare fee in order to obtain a license to practice, stating:

> there is nothing irrational about a state's saying that a doctor, entering the profession, must promise to follow the rules. Nor is it irrational to say that a doctor who seriously violates the rule -- who commits a violation that is 'commensurate with' the penalty of license revocation -- is not "fit" to practice medicine. Id. at 797.

-- Judge Breyer similarly rejected an effort by the medical profession to use the antitrust laws to invalidate cost-control requirements by Blue Shield, which required doctors to promise not to charge subscribers additional fees. See Kartell v. Blue Shield, 749 F.2d 922 (1st Cir. 1984).

-- Judge Breyer has consistently protected the rights of Medicare and Medicaid recipients against formalistic regulations and excessive bureaucracy. See Mayburg v. Secretary of Health & Human Services, 740 F.2d 100 (1st Cir. 1984) (residents in nursing homes need not leave nursing homes to continue to receive benefits); Ciampa v. Secretary of Health & Human Services, 687 F.2d 518 (1st Cir. 1982) (social security recipients do not lose Medicaid benefits because of cost-of-living increases in other benefits).

2. Ensuring Full Compensation for Victims

-- Judge Breyer has issued a landmark decision that protects the rights of families to obtain compensatory damages from pharmaceutical companies when family

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members are injured as a result of vaccinations. See Schafer v. American Cyanamid Co., No. 93-1422 (March 24, 1994). Judge Breyer rejected the argument that permitting all victims to be compensated would raise drug prices and his opinion ensures that families will be able to obtain full compensation for their injuries.

3. Preventing Businesses from Illegally Raising Prices

-- Judge Breyer has enforced the antitrust laws to ensure that companies cannot raise prices charged to consumers.

  -- Judge Breyer has vigorously enforced the antitrust laws against cartels with the potential to raise prices for the consumer. See FTC v. Monahan, 832 F.2d 688 (1st Cir. 1987) (allowing FTC to obtain information necessary to prevent pharmaceutical cartels from raising drug prices). In a recent case, Caribe v. Bayerische Motoren Werke Aktiengesellschaft, No. 93-1653 (March 25, 1994), Judge Breyer reversed a lower court decision dismissing an antitrust claim where a small distributor alleged that a large manufacturer was offering preferential prices to other customers.

  -- Judge Breyer recognizes that the purpose of antitrust laws is to protect consumers from prices that are too high, not too low. See Kartell, 749 F.2d 1984. Thus, he has consistently rejected antitrust claims where the supposed economic injury was that competition was being harmed by low prices. See Kartell; Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227 (1st Cir. 1983) (rejecting predatory pricing claims where the evidence showed nothing more than that one company charged less than the other).

4. Protecting Access to the Courts for Ordinary People

-- Judge Breyer is a strong advocate of open access to the courts for all those with meritorious claims. He was a sharp critic of proposals by former Vice-president Dan Quayle, which would "scare people of modest means away from the court system even if they have legitimate claims." As Judge Breyer explained, "I worry about [people with modest means], who I think should be helped." Judge Breyer has criticized efforts to close the federal courts, and instead has focused his efforts on making courts faster and more efficient at dispensing justice. See Breyer, The Donahue Lecture Series: Administering Justice in the First Circuit, 24 Suffolk L. Rev. 34 (1990). The importance of federal review is, as Judge Breyer notes, that "[i]t recognizes that a

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social security claimant's injured back may have the importance of a corporate shareholder's lost profits." Id. at 36.

5. **Requiring Government to Fulfill Its Duty to the Public**

-- Judge Breyer has championed the public's right to have government officials perform their duties. In NAACP v. Secretary of Housing and Urban Development, 817 F.2d 149 (1st Cir. 1987), Judge Breyer held that the federal courts could review claims that the HUD Secretary had failed to further the basic policies of the Fair Housing Act. In that case, Judge Breyer made clear that a pattern of inaction by government officials in the face of a statutory mandate can be just as illegal as any act that is contrary to law.

6. **Recognizing the Human Side of Issues**

-- Judge Breyer, known for his intellectual prowess in the field of economics, recognizes that economics alone cannot answer many of the most pressing issues of social policy. In a review of the book The AIDS Epidemic in an Economic Perspective, Judge Breyer criticized the authors for looking only to economics in analyzing social choices. As he explained, "economics alone cannot prescribe how much a society should spend on health and safety." Judge Breyer similarly has revealed this recognition in his jurisprudence. See Kartell, 749 F.2d at 931 ("the subject matter of the present agreement -- medical costs -- is an area of great complexity where more than solely economic values are at stake").

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6580

THE WHITE HOUSE

WASHINGTON

May 24, 1994

MEMORANDUM FOR CLIFF SLOAN

FROM: **JAKE SIEWERT**

SUBJECT: Breyer Record on Judiciary Committee

Sorry about the delay. I am not usually that irresponsible. You should have this material fact-checked, because I never gave it a thorough look again. There is a lot of material on deregulation work, but I was not sure that is helpful here. Also, the FBI Charter business is more complicated than I wrote it -- basically, there was some division between Carter and Kennedy fueled by primary politics. The whole story of Judge Thompson is intriguing, but there is no public record of Breyer's role there. Finally, I did not finish tracing the material about the federal criminal code, but that did occupy much of the committee's time.

Ask Jake for
Hard Copy of
other Talking Points
he was working.

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JUDGE BREYER
RECORD ON JUDICIARY COMMITTEE

- **Helped Confirm First Two Black Judges in Alabama.** During Stephen Breyer's tenure as Chief Counsel for the Senate Judiciary Committee, Senators Howell Heflin and Donald Stewart recommended U.W. Clemon and Myron Thompson for appointment to the U.S. District Court in Alabama. Judges Thompson and Clemon were the first black judges appointed to the federal bench in Alabama since Reconstruction, and the confirmation process was not easy. The hearings touched on sensitive political and racial nerves. U.W. Clemon had defended blacks arrested in the early civil rights movement and later served in the Alabama State Senate. With Judge Breyer's help, Myron Thompson emerged as a consensus replacement for Fred Gray, a civil rights leader whose nomination foundered over legal work he had done earlier. In large part because of the hard work of the Senate Judiciary staff, both Thompson and Clemon ended up on the bench where they serve with distinction today. In fact, Judge Thompson is often mentioned as a potential future Supreme Court nominee.

- **Helped Establish a Policy Against Confirming Judicial Nominees Belonging to Discriminatory Clubs.** As Chief Counsel, Stephen Breyer helped forge a bipartisan consensus on a policy governing discriminatory clubs. The Senate Judiciary Committee adopted a policy disapproving judicial nominees' membership in clubs with discriminatory membership practices. Breyer worked hard to establish a policy that was affirmed jointly by ranking Republican Strom Thurmond and Chairman Ted Kennedy on club memberships.

- **Worked Hard to Develop a Charter to Govern FBI Action.** In the wake of the Watergate scandal and some irregularities during J. Edgar Hoover's term as FBI Director, a wide agreement emerged that a charter was needed to govern the FBI's day-to-day activities. Under pressure from the ACLU on one side and conservative Republican Senators on the other, Stephen Breyer helped develop a FBI charter that received bi-partisan support. The charter established a series of principles to ensure that the FBI focus its attention on criminal conduct, not lawful religious or political activity, and that the FBI would use minimal intrusion in its investigations. The charter won backing from Senator Strom Thurmond and then-FBI Director William Sessions, who served under both Carter and Reagan; unfortunately, it ended up tied up in election-year politics and was never enacted.

- **Fought to Reduce "Padded" Trucking Costs.** As Chief Counsel, Stephen Breyer worked on a joint effort by Senator Kennedy and the Carter administration to deregulate the trucking industry. Concerned that regulation under the 1935 Motor Carrier Act had stifled competition and padded the costs of truck transportation, Breyer and Kennedy crafted legislation to eliminate unnecessarily bureaucratic restrictions and end the practice of legalized price-setting for intercity hauling.

- **Helped Draft a Revised Federal Criminal Code.**

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Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. list	Ron's suggestions (1 page)	n.d.	P5 b(1)

COLLECTION:
Clinton Presidential Records
Counsel's Office
Cliff Sloan
OA/Box Number: 4263

FOLDER TITLE:
Decisions on Media

2006-1067-F
ds380

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
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6501

Ron's suggestions from RBG video —

① opening statement (good)

② 2nd or 3d round: Bidin on privacy, methodology (good)
(especially Michael H.)

③ RBG and Feinstein (good)
"easy to make her look like an idiot"

④ RBG and Priessler (good)
because he is watching

⑤ 1st RBG and Kennedy exchange
"finest moment of hearing" because of combination of legal acumen and tremendous dose of privacy and likeability

⑥ Grassley's clerk mentorship issue question (good)
good example of handling personal questions

⑦ exchange with Kohl
to be prepared for question about favorite books and movies
to be prepared for "what kind of tree would you like to be?"

⑧ Hatch question on diversity of clerks hired

Ron's overarching suggestion → focus on the more general qualities of the Court the because SCOTUS is less familiar with them

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Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Swidler & Berlin Group Memordandum to the File (6 pages)	06/08/1993	P5 6502

COLLECTION:
Clinton Presidential Records
Counsel's Office
Cliff Sloan
OA/Box Number: 4774

FOLDER TITLE:
[Breyer Confirmation Memoranda] [Binder] [10]

2006-1067-F
ds385

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
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MEMORANDUM TO THE FILE June 8, 1993

FROM: SWIDLER & BERLIN GROUP

RE: JUDGE BREYER

We have reviewed virtually all (a few cases remain to be read) criminal law and sentencing decisions by Judge Breyer. His opinions reflect a largely conservative view of criminal law with a great deal of deference to the institutional players, e.g., police, prosecutors, prison officials. He generally defers to the trial court on evidentiary issues and on other miscellaneous questions such as speedy trial and insanity/competency issues. Breyer clearly is a first-class judge in terms of the craft of judging: analytically well reasoned opinions, clear writing, meticulous attention to the trial record and honest attempts to grapple with the arguments raised by the parties. If anything is missing, in our view, it is the ability to perceive potential abuses that may arise from allowing largely unrestrained discretion in law enforcement authorities. However, one would expect that most of his criminal decisions will be well received politically.

The more significant decisions are as follows:

United States v. Jessup, 757 F.2d 378 (1st Cir. 1985)

Breyer upholds against a constitutional challenge a provision of the Bail Reform Act of 1984 that requires the magistrate to apply a rebuttable presumption in setting bail that a defendant charged with a serious drug offense will likely flee before trial. Judge Breyer construes the legislation to require a shifting of the

CLINTON LIBRARY PHOTOCOPY

burden of production, not the burden of persuasion and, as construed, finds the presumption constitutional in light of the evidence before Congress that drug offenders present a special risk of flight.

- **United States v. Klubock**, 832 F.2d 664 (1st Cir. 1987) (en banc)

The issue before the en banc court was whether the district court, by local rule, could require prior judicial approval before a grand jury subpoena may be served on an attorney, in light of Rule 17's grant of broad discretion to issue subpoenas. The en banc court was evenly divided on the issue. Three judges would have approved the local rule, finding a valid exercise of the district court's supervisory authority. Judge Breyer, along with one other judge, found that the rule was adopted without public notice and opportunity for comment (as required by Rule 57). Breyer appears unsympathetic to the attempt to restrain the prosecutor's discretion, but his opinion does not squarely address the propriety of the local rule. His opinion provoked a sharp rebuke from the rest of the court for deciding the case on a ground not raised by the parties.

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- **United States v. Hastings**, 847 F.2d 920 (1st Cir. 1988) **(DISSENT)**

The case is one of the relatively few in which Judge Breyer ruled in favor of the criminal defendant. The majority reversed the trial court's dismissal with prejudice of an indictment for violation of the Speedy Trial Act, finding that the government's deliberate failure to comply with certain discovery requests (seeking disclosure of promises made to an informant) was improper but not sufficient to require dismissal with prejudice. Breyer, in dissent, calls the question a "close one" but finds that the district court did not err in taking into account the government's violation of the discovery rules, which had broad implications for the criminal justice system even though the failure did not directly prejudice the particular defendant.

- **United States v. Rivera**, (1993 W.L. 181368, 1st Cir. June 4, 1993)

Breyer recently analyzed the circumstances under which a district court has the power to impose a sentence that departs from the sentencing guidelines. In a well-crafted opinion, Breyer found that the district court held an unduly narrow view of its departure power and remanded to permit a downward departure. The case can be cited as an example of Breyer's taking into account individual

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circumstances in sentencing (at least where sentencing guidelines have not taken expressly precluded such consideration).

- **United States v. Vachon**, 869 F.2d 653

The trial court had utilized the wrong standard in determining the defendant's competency. Judge Breyer nevertheless ruled for the government and affirmed the conviction on the ground that, functionally and practicably, the trial court had utilized the correct standard. In the same case, the government was erroneously permitted to adduce from its expert witness the expert's opinion on the ultimate issue, in violation of the Federal Rules of Evidence. Breyer found, however, that this had been "invited error" because the defendant also had adduced testimony from its expert, which included an opinion on the ultimate issue. Although it is difficult to tell from Breyer's opinion, the insanity issue in this case appears to have been relatively complicated. Nevertheless, Breyer deferred to the trial court's decision to allow the defendant to retain only one expert witness under the Criminal Justice Act (which provides funds for attorneys, experts, and other expenses for indigent defendants).

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- **United States v. Simon**, 842 F.2d 522

A defendant in a drug prosecution challenged the admission at trial of evidence of a prior conviction under foreign law for cultivating marijuana. In an unilluminating opinion, Breyer and another judge affirmed the conviction. Judge Toruella, concurring, expressed strong reservations about the First Circuit's unbroken line of authority allowing the essentially unbridled admission of other crimes evidence.

- **United States v. Rubio-Estrada**, 857 F.2d 845

In a prosecution for possession with the intent to distribute, the defendant's prior conviction for possession with intent to distribute was admitted. Again, Breyer affirmed the trial court's ruling admitting this evidence, on the ground that the evidence showed the defendant's "intent" and "knowledge." In a strong dissent, Judge Toruella pointed out that, at oral argument, the government could not explain how this evidence showed anything other than the defendant's "disposition" to commit such crime, the evidentiary use of which is clearly prohibited by the Federal Rules of Evidence. Judge Toruella also noted that Judge Breyer's view that the other crimes evidence related to intent/knowledge but not to disposition was extremely strained. These two cases reflect a

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strongly pro-government position regarding application of the "other crimes" evidence rule.

- **United States v. Zannino**, 761 F.2d 52

The magistrate and the district court had ruled that the new "preventive detention" provision of the Bail Reform Act could not be applied to a defendant who had been arrested prior to the effective date of the provision, even though the review of the defendant's bail took place after the effective date. Relying upon Congressional intent and the working of the statute, the majority reversed the trial court's ruling and concluded that upon review the new provisions could be applied. Breyer reached the contrary conclusion. The defendant involved was charged with offenses involving, inter alia, murder arising out of gambling activities. Thus, in this one instance, Breyer could be criticized for having bent over backwards to keep a defendant, accused of an extremely serious crime, and whom the trial court repeatedly found to be very dangerous to the community, on release pending trial.

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION	
001. memo	Ian Gershengorn to Tom Perrilli re: Senate confirmation (6 pages)	06/09/1993	P5	6503
002. memo	Elizabeth Cavanagh to Tom Perrelli re: Judge Breyer (2 pages)	06/09/1993	P5	6504

COLLECTION:
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Cliff Sloan
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FOLDER TITLE:
[Breyer Confirmation Memoranda] [Binder] [1]

2006-1067-F
ds381

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
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P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
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Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
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b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

M E M O R A N D U M

TO: Tom Perrilli

FROM: Ian Gershengorn

DATE: June 9, 1993

SUBJECT: Senate Confirmation Proceedings - Appointment to First Circuit (filename:confirm.one)

Summary

The Senate confirmation hearings for Judge Breyer's appointment to the First Circuit Court of Appeals reveal few substantive concerns about Judge Breyer. The process itself was marked by relative brevity. Judge Breyer's testimony before the Senate Judiciary Committee lasted a mere 27 minutes. During this hearing, Breyer declined to make any personal statement, and faced real questioning from only one Senator, Senator Chafee from Rhode Island.

In the Senate debates, Breyer's nomination was strongly supported by Senators from across the political spectrum.[1/] Senators Kennedy, Hatch, Thurmond, and DeConcini, among others, expressed their support of Breyer's nomination. Two senators, Senator Morgan (D - NC) and Senator Humphrey (R - NH) spoke out strongly and at length against the nomination. Their complaints, as is evident from the detailed description below, were not primarily with Judge Breyer per se, but rather with the process that led to the nomination.

At no point in either the Senate Judiciary hearing or in the debate before the Senate was there any discussion of

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1/ Judge Breyer was confirmed by a vote of 80-10.

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Judge Breyer's positions on any substantive area of law.[2/] In short, during the whole process, there were only three issues that are even potentially relevant to Judge Breyer's present consideration: (1) the overtly political nature of his nomination process; (2) his lack of trial and appellate experience; and (3) a brief statement by Judge Breyer that suggests a generally conservative judicial philosophy. Each of these will be discussed in turn.

The Nomination Process

In the Senate debates on Judge Breyer's nomination, two Senators spoke at length about the process of Breyer's nomination, complaining about the overt political maneuvering involved. Judge Breyer's nomination came after the electoral defeat of President Carter at a time when the minority (soon to be the majority) members of the Senate Judiciary Committee were unwilling to send any more nominees to the full Senate. Nevertheless Judge Breyer got through, in part because of his work as Chief Counsel to the Senate Judiciary Committee, and in part because of his close ties to Senator Kennedy.

The discussion of the process was treated at length by Senator Morgan on the floor of the Senate, and will be summarized only briefly here:[3/]

[2/] The only exception to this was one or two references to Judge Breyer's affinity for deregulation, an affinity that was apparent from the important role he played in formulating the legislation deregulating the airline industry.

[3/] Senator Kennedy offered a rebuttal to many of the points raised by Senator Morgan. See Congressional Record at 31457-31459.

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A First Circuit Judge Nominating Commission sent five names to the President for the open First Circuit position. Judge Breyer's name was not among them. Apparently, the names were unsatisfactory (allegedly to Senator Kennedy) and a second list (to be generated by a new nominating commission) was requested. Despite the unusual nature of the request, it was acceded to and a second list of six names was produced. Again, Judge Breyer's name was not on the list.

Then, according to Senator Morgan, President Carter and Senator Kennedy agreed prior to the Democratic National Convention that after the election, President Carter would submit Judge Breyer's name for the First Circuit vacancy.

After the election, Judge Breyer's name was indeed submitted, and it received extraordinarily quick turnaround. The nomination was announced on November 10, 1980, and was sent to the full Senate within a week. The hearing before the Senate Judiciary Committee lasted only 27 minutes, the majority of which time was spent praising Judge Breyer's qualifications. According to Senator Morgan, the decision to send Judge Breyer's name to the full Senate came two days before the ABA's approval came in and roughly a week before the final FBI report was completed. Moreover, all of this occurred at a time when seventeen other nominees for federal judgeships were being held up in committee.

Senator Humphrey also objected to the political maneuvering surrounding the Breyer nomination. In contrast to Senator Morgan, who was alleged to have a personal

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vendetta against Judge Breyer resulting from Judge Breyer's role in defeating the nomination of a friend of Senator Morgan, see Congressional Record at 32998, Senator Humphrey was motivated by a general belief that no lame duck appointments should be approved.

In short, the vast majority of the Senate debate on the Breyer nomination was not directed at the qualifications, positions, or judicial philosophy of Judge Breyer, but rather focused on the political process leading to his nomination.

Lack of Experience

The one "substantive" concern expressed by Judge Breyer's opponents was his lack of trial experience. In response to questioning by Senator Chafee, Judge Breyer revealed that he had no trial experience, and that he had argued only one appellate case. Judge Breyer sought to minimize the importance of the lack of experience, however, noting his work as Assistant Federal Prosecutor during Watergate, as well as his extensive appellate experience (at least for written submissions) as the "acting head" of the Appellate Section of the Antitrust Division at Justice and as a consultant in appellate cases. Moreover, Judge Breyer suggested that he might mitigate any negative impact from this lack of trial experience by sitting in on trials in the district court.

Judge Breyer's opponents in the Senate emphasized both this lack of experience and his expressed desire to sit in on district court trials. Senator Morgan noted that "I do not

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believe that any lawyer who has practiced in the courts would ever say that a man who never tried a case in a trial courtroom and a lawyer who argued only one case, as a friend of the court, as a young attorney in the appellate court, would be competent to sit on one of the highest courts of this land." See Congressional Record at 33012. Senator Morgan also commented that Judge Breyer's sitting in on trials was inappropriate, noting that "In the first place, as a lawyer for thirty years, the first thing I would do if I was arguing a case before a court of appeals would be to move to disqualify any appellate court judge who sat in the courtroom during the trial of the case." See Congressional Record at 33011.

Despite the emphasis given to this at the confirmation hearings, it seems unlikely that Judge Breyer's lack of trial experience would be an important factor in opposition to his nomination. Given his lengthy experience on the Court of Appeals, concerns about his lack of trial experience seem relatively unimportant for the Supreme Court.

Judicial Philosophy

As noted above, Judge Breyer revealed very little about his judicial philosophy during his confirmation hearings. However, one comment made before the Senate Judiciary Committee does indicate Judge Breyer's generally conservative judicial leaning. Judge Breyer stated, "[W]hen we were dealing with airline deregulation and trucking deregulation, the matter came up about whether it would be possible for

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courts to work those changes, even without legislation. Despite my firm convictions that was a desirable direction to go in, we came to the conclusion here that it would require legislation for courts would on the basis of precedents and law be required to decide the contrary of what we felt was desirable." See Congressional Record at 31453. Whether or not this approach is appropriate, it certainly expresses a relatively restrictive and conservative judicial approach.

Conclusion

There is relatively little in Judge Breyer's Court of Appeals Senate confirmation hearings that suggests trouble. The opposition to his nomination seems largely to have been for personal (Senator Morgan) or systemic (Senator Humphrey) reasons. All of the speakers -- pro and con -- expressed little doubt about Judge Breyer's intellect or qualifications. The only substantive concern was Judge Breyer's lack of trial experience, a concern that does not seem too devastating for a Supreme Court nominee with thirteen years of experience as an appellate judge. The worst that could be said is that Judge Breyer could be perceived as a political player, or at least was the beneficiary of political maneuvering. Finally, in the one brief glimpse into his judicial philosophy, Judge Breyer revealed that he has a generally restrictive view of the role of judges, a point that might raise some concern among liberals.

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M E M O R A N D U M

TO: Tom Perrelli

FROM: Elizabeth Cavanagh

DATE: June 9, 1993

SUBJECT: Judge Breyer: Newspaper Articles and Sentencing Guidelines

I have read several newspaper articles on Judge Breyer, dated from June 9, 1980 to December 4, 1986, as well as his testimony as Sentencing Commissioner before the Senate Committee on the Judiciary, dated October 22, 1987. The articles raise troubling questions about the process by which Judge Breyer's nomination by President Carter in 1980 was approved by the Committee on the Judiciary. Of seventeen Carter nominees in September, 1980, only Judge Breyer's nomination was approved, with the support of a rather unlikely trio, Senators Kennedy, Thurmond, and Laxalt. The Committee initially approved the nomination by telephone poll rather than in a meeting; this set off a procedural dispute in the Senate which led to a new, more formal vote on the nomination by the Committee.

The articles provide only a couple of clues about Judge Breyer's judicial philosophy. In one article, he explained that the role of the judge when interpreting statutory language is to decide "at least what a rational person could have meant" when choosing particular words in the statute. Linda Greenhouse, Washington Talk: The Great Gap Between Congress and Judges, N.Y. Times, Nov. 23, 1986, at A66. In another article, Judge Breyer suggested that

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courts and agencies should "look a little more closely" at agency rules. Timothy S. Robinson, Lawyers, Judges Rub Elbows Socially, Wash. Post, June 9, 1980, at B16. These views seem quite moderate; Judge Breyer apparently occupies a middle ground on statutory interpretation and judicial deference to rules promulgated by agencies.

Judge Breyer's position as a member of the Sentencing Commission, which drafted the Sentencing Guidelines in 1987, is more controversial. However, while the Guidelines aroused the hostility of many federal judges, it would be unfair to lay all of the blame for this on Judge Breyer, who was after all only one member of the Commission. Furthermore, his testimony to the Committee on the Judiciary in support of the Guidelines appears to be reasonable and fair to both sides of the debate. Perhaps in response to charges that the Guidelines are radical or revolutionary, Judge Breyer emphasized that the Guidelines are based largely on past sentencing practices, although he admitted to making policy judgments as well. Judge Breyer seems particularly concerned with white collar criminals, whose sentences are, in his view, too lenient in comparison with those of other, "blue collar" criminals.

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001. memo	Memorandum for Joel Klein (2 pages)	06/10/1993	P5	6505

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[Breyer Confirmation Memoranda] [Binder] [2]

2006-1067-F
ds382

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
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June 10, 1993

MEMORANDUM FOR JOEL KLEIN

Re: Breyer -- Selected Writings

I am returning the various materials from the Breyer Box that I took away last night. There is nothing of concern, but a few of the pieces merit brief comment:

1. Amicus Brief. As a young justice department lawyer, Judge Breyer wrote a May 1966 amicus brief in the Sixth Circuit urging reversal of a district court opinion that dismissed an antitrust lawsuit challenging the racially restrictive practices of white real estate brokers in Akron, Ohio. Judge Breyer argued that the alleged effects on inter-state commerce were sufficient, as were the allegations of a Sharman Act violation. The brief is a superb piece of advocacy and a reminder that, despite his background in the areas of administrative and antitrust law, Breyer was obviously engaged by issues of racial justice.

2. First Boston Memorandum. An internal First Boston memorandum of March 1979 alerts various executives that Breyer would be visiting the office and available to meet with large clients. There is nothing wrong with the memorandum, but it suggests another area of vetting -- his consulting work.

3. Antitrust Policy in Translation. The chapter relevant to Judge Breyer appears at pages 5 to 21 of this book and records a March 1983 Conference Board symposium in which

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Judges Breyer and Bork discussed judicial precedent and economics. (It was also reprinted as part of a 1983 Conference Board Bulletin, perhaps one of the bulletins you are trying to track down.) There is nothing controversial, and Judge Breyer repeatedly disagrees with Judge Bork.

MFD

Mitchell F. Dolin

Enclosures

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Withdrawal/Redaction Sheet
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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION	
001. memo	David Ogden to Joel Klein re: First Amendment (10 pages)	06/07/1993	P5	6506
002. memo	Ann Kappler to Joel Klein re: Breyer Opinions (4 pages)	06/08/1993	P5	6507
003. memo	Greg Magarian to Don Verrilli re: Analysis (4 pages)	06/07/1993	P5	6508
004. memo	Tom Perrelli et al to Joel Klein (4 pages)	06/08/1993	P5	6509

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2006-1067-F
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M E M O R A N D U M

TO: Joel Klein

CC: Don Verrilli

FROM: David Ogden

DATE: June 7, 1993

SUBJECT: First Amendment Opinions of Judge Stephen Breyer

Overview: Judge Breyer has authored a significant number of opinions dealing with First Amendment issues, although two-thirds of them (18 out of 27) involve the narrow issue whether politically motivated discharges or demotions from government employment violate the First Amendment.

None of his First Amendment opinions appears to contain any statement that on its face could cause problems for Judge Breyer if he were the nominee. I found no blatant insensitivity to racial or sexual issues, for example, or otherwise any glaringly narrow social biases.

Judge Breyer is extremely able. His opinions are dense both with the facts of each case and with his legal reasoning. The opinions are well and impressively argued. Judge Breyer is attracted to unorthodox resolutions of cases, and is happy to rule on grounds other and frequently narrower than those argued by the parties. He grasps the issues, directly grapples with them, and is never off-point.

Judge Breyer's judicial temperament appears beyond reproach. His opinions are very dry. He appears disinclined to flights of rhetoric, preferring to stick to a pedestrian but lucid prose style. He professes to prefer "practical"

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solutions to problems, rather than "theoretical" ones, which may explain his predominant judicial mode, at least in this area: interest balancing. Doctrine and close parsing of the facts, not the broad principles and aspirations that underlie the First Amendment, generally seem to drive Judge Breyer's judicial decisionmaking.

In First Amendment terms, Judge Breyer is a "balancer." He is as a whole, moreover, very sympathetic to the concerns and needs of the state. Although one could count his attraction to ad hoc balancing as "activism" of a sort, Judge Breyer is certainly not a judicial activist in the traditional sense. One might characterize him as the opposite -- very much what is called a judicial conservative, who prefers not to disturb the results of the political process, and not to fetter the process itself. This non-interventionist inclination is reflected in the cases in which Judge Breyer employs non-merits rules (such as qualified immunity, equitable balancing, abstention, and parties' litigation errors) to rule for First Amendment defendants, and in cases reaching the merits in which Judge Breyer shows great solicitude for administrative considerations and similar governmental concerns. First Amendment claims generally prevail with Judge Breyer when, but only when, in his view, the state has failed to articulate reasons persuasive enough to justify a particular infringement on liberty. First Amendment plaintiffs do win with Judge Breyer on this basis from time to time.

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Generally, Judge Breyer is much more attracted to this ad hoc balancing of interests -- and legal tests that permit him to perform such balancing -- than to First Amendment tests that would constrain balancing of this kind.

On the Court, on First Amendment issues, I suspect Judge Breyer would be something of a cross between Justices White and Stevens -- combining the open-minded but generally statist orientation of Justice White with Justice Stevens' inclination to balance complex facts and policies to reach a result. He would not be a "sure vote" for either side in virtually any First Amendment case. But his approach would generally meld more with the conservative side than the liberal side of the bench.

Judge Breyer appears to be least tolerant of governmental restrictions on political speech, compare Ozonoff v. Berzak, 744 F.2d 224, 230 (1984) (striking down loyalty investigations of U.S. applicants for jobs with international organizations) with Rushia v. Ashburnam, Mass., 701 F.2d 7 (1983) (affirming denial of injunction against allegedly unconstitutional prosecution to retailer of allegedly "indecent" magazines), at least where that speech is "pure" and not combined with regulable conduct, see United States v. Bader, 698 F.2d 553 (1983) (upholding convictions of protesters who blocked access to draft registration office).

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Cases of note.

1. The Seventeen Political Discharge Cases.

Judge Breyer plainly became the First Circuit's point-judge for the Puerto Rico political discharge cases. He evolved a standard in these cases pursuant to which a plaintiff whose job had the least modicum of discretion, or potential for exercising of discretion, could not recover damages for discharge or demotion. Only those in the jobs most removed from politics could recover damages. Judge Breyer used what could be characterized as an aggressive application of the qualified immunity doctrine to deny damages to such claimants.

Judge Breyer's concurring and dissenting opinion in Agosto-Feliciano v. Aponte-Roque, 889 F.2d 1209 (1989), is revealing. In an opinion characterized by Judge Campbell as "brilliant," Judge Breyer explained at length why a literal application of Branti and Elrod v. Burns could unreasonably straightjacket elected officials from implementing the will of the people. It is the only place where I noted Judge Breyer advocating departure from Supreme Court precedent, here, in a way favorable to government. A good companion piece to Agosto-Feliciano is Members of Jamestown School Comm. v. Schmidt, 699 F.2d 1 (1983), an establishment clause case. In Jamestown, he concurs separately, and at length, to express and explain his agreement with Supreme Court decisions the majority deemed controlling, but applied reluctantly. The Supreme Court decisions Judge Breyer

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defended in Jamestown, unlike those he attached in Agosto-Feliciano, were pro-government.

2. Alexander v. Trustees of Boston Univ., 766 F.2d 630 (1985). Here, the 1st Circuit approved denial of federal aid to students who refused to fill out certain forms reflecting their draft status based upon asserted religious scruples. Judge Breyer dissented, arguing that the refusal to provide aid should be reversed on narrow grounds that the majority said had not been advanced by the students. Specifically, Judge Breyer argued that the students had substantially complied with the requirements, and thus the government did not have a sufficient explanation for its adverse action in the circumstances.

3. Aman v. Handler, 653 F.2d 41 (198_). Writing for the Court, Judge Breyer reversed denial of a preliminary injunction to a student branch of the Unification Church that had been denied official recognition by the University of New Hampshire. UNH had failed to articulate adequate reasons to support its refusal to recognize the Church-affiliated student group. Although ruling in favor of the student group, Judge Breyer declined to order entry of the injunction, in order to afford the University an opportunity to make the required showing.

4. DeFeliciano v. DeJesus, 873 F.2d 447 (1989). A political discharge case in which Judge Breyer, for the court, disposed of plaintiffs' claims (and reversed their judgment) on grounds arguably not urged by the defendants.

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Plaintiffs' counsel were plainly disturbed by the unanticipated grounds for the decision (as reflected in the rehearing opinion) and the result may be somewhat draconian. Yet the case appears to be well-reasoned. This case, Aman, and some others may suggest the Judge Breyer wants to write an opinion reflecting his views once he forms them, whether or not the parties have litigated the case in a manner that permits him to do so. Shannon v. Telco Communs., 824 F.2d 150 (1987), may be a counter-example, however; Judge Breyer refrained from ordering Younger abstention there, because the defendants had failed to raise the issue on appeal.

5. Figueroa-Rodriguez v. Lopez-Rivera, 878 F.2d 1478 (1989). A political discharge case that may be mildly controversial. Judge Breyer, for the court, held that the politically motivated dismissal of an administrative judge was not clearly unconstitutional, and thus was protected by qualified immunity. The dissent found the notion that this judgeship is a properly "political" job troubling.

6. Hernandez-Tirado v. Artau, 874 F.2d 866 (1989). This political discharge case also may be mildly controversial. Here, for the Court, Judge Breyer overturned an award of punitive damages, despite holding that the discharge knowingly violated the plaintiff's First Amendment rights. The opinion is very thoughtful, but it draws a dissent (denominated "dubitante") from Judge Campbell on this point.

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7. Kercado-Melendez v. Aponte-Roque, 829 F.2d 255 (1987). Plaintiff school teacher was dismissed and told she had a right to appeal through an administrative process. The 1st Circuit majority held that she was not obligated to exhaust this remedy, and that the district court need not abstain from her challenge to the dismissal as politically motivated. Judge Breyer dissented, advocating what appears to be an extension of Younger abstention. Judge Breyer rejected the majority's ruling that Younger abstention is not appropriate where a plaintiff elects not to pursue administrative remedies, at least where the First Amendment challenge is not to the state proceedings themselves. Judge Breyer's argument is quite technical. He argues that Younger applies because the dismissal could not become final until the plaintiff either failed to file or lost her administrative appeal. The opinion appears to signal real sympathy with comity/federalism arguments, even where they substantially curtail federal jurisdiction over constitutional claims. See also Rushia v. Ashburnham, Mass., 701 F.2d 7 (1983) (addressing importance of comity concerns).

8. Maceira v. Pagan, 649 F.2d 8 (1981). In this case, Judge Breyer upheld labor-statute-based rights of freedom of expression and freedom from retaliation of a union activist. The opinion reflects sensitivity to the importance of injunctive relief when First Amendment-type rights are at stake. But see Rushia, supra.

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9. Members of Jamestown School Comm. v. Schmidt, 699 F.2d 1 (1983). Establishment clause case involving Rhode Island statute affording free busing to private as well as public school children. Court upholds program reluctantly based upon recent summary Supreme Court action. Judge Breyer wrote a long ~~dissent~~ concurrence painstakingly arguing that the recent Supreme Court decisions were correct. His opinion is very careful, and emphasizes the facts of the particular case. His generally sympathetic posture toward the state is particularly clear when he rejects the process of combining two different state statutes to discover a discriminatory effect: "the Equal Protection Clause does not automatically invalidate a statute simply because that statute can be combined with another to produce a result that seems unfair or even irrational. . . . The same is true here" -- even in an establishment clause case. Judge Breyer clearly believes it is important that the judicial approach to these issues not make it impossible for the states to exercise the power upheld in Everson, i.e., funding bus transportation for private school children. Judge Breyer agreed, however, that one provision of the law, which required official scrutiny of the religious instruction offered in private schools, violated the establishment clause.

10. Ozonoff v. Berzak, 744 F.2d 224 (1984). This is a potentially important case. A copy is attached. It is Judge Breyer's most liberal First Amendment opinion. It contains uncharacteristically passionate language about the

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First Amendment and its history and role. See, for example, page 232: "One need only examine this nation's practical, historical experience with the Sedition Act of 1798, to understand the radical threat to freedom that lurks in the word 'sedition.'"

Ozonoff involved a requirement in a 1953 executive order, dating from the McCarthy era, that WHO not hire any U.S. national unless approved on "loyalty to the U.S." grounds by the U.S. government. Judge Breyer overcame a not-trivial justiciability argument and significant merits arguments by the government to strike down the 31-year-old order. He explained why Laird v. Tatum did not bar the applicant's claim, despite the fact that the claim was largely based on a chilling effect theory. Judge Breyer's analysis is trenchant and pro-plaintiff. On the merits, he reasoned to the result through "three sets of Supreme Court cases." Before ruling for the plaintiff, however, Judge Breyer carefully canvassed the government's arguments, but found that they were not weighty enough to support the loyalty requirement as applied to "persons such as Dr. Ozonoff." 744 F.2d at 233. Thus, in the end, the ruling is only "as applied," and rests, once again, on ad hoc balancing.

11. New Life Baptist Church Academy v. E. Longmeadow, Mass., 885 F.2d 940 (1989). This important case involved a challenge by a private religious school to Massachusetts' requirement that private schools be officially

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"approved." Judge Breyer upheld the requirement against both free exercise and establishment clause challenges, applying balancing analysis. Judge Breyer found the state's interest in ensuring its children receive a quality secular education to be compelling. That interest drove his analysis. Notably, Judge Breyer took the "least restrictive alternative" prong of the free exercise test and converted it into a frank balancing of the individual interests versus the state interests at stake. pp. 946-947. Judge Breyer specifically said that "administrative considerations" properly play a significant role in determining whether the state has employed the "least restrictive means." p. 947. To lawyers on the Judiciary Committee, this approach may raise some eyebrows.

* * *

The one case in the First Amendment section of the outline I did not review, because I could not locate the reporter, was Hernandez-Tirado v. Artua, 835 F.2d 377 (1987), another political discharge case. I did review a subsequent related decision of the same name, however, and very much doubt the first Hernandez-Tirado decision will contain any material of great significance.

Please let me know if I can be of further assistance.

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MEMORANDUM

TO: Joel Klein

FROM: Ann Kappler AK

DATE: June 8, 1993

SUBJECT: Breyer Opinions

I reviewed ten Due Process cases and three Takings/Eminent Domain cases. None was particularly remarkable, and each reflected tight, narrow reasoning with a view toward resolving the particular case before the court rather than using the case a vehicle for broader development of the law.

Due Process

In each of the ten Due Process cases, Judge Breyer wrote the opinion for a unanimous court in non-controversial cases decided on narrow (often fact-bound) grounds. The opinions are workman-like and devoid of any emotion or sensitivity. There is a notable detachment in his writing in this area.

In the majority of cases, the court concluded that the plaintiff had received all the process he or she was constitutionally due -- conclusions with which even more liberal judges would probably agree in the given circumstances.

Judge Breyer is best described as a moderate regarding recognition of constitutionally protected property and liberty interests. For example, in Rose v. Nashua Bd. of Educ., 679 F.2d 279 (1982), he expressed doubt (for a

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unanimous court) that a public school child's interest in free busing (uninterrupted unless that child is shown to have acted improperly) is weighty enough to deserve constitutional protection. See also Beitzell v. Jeffery, 643 F.2d 870 (1981) (lenghty discussion of why university professor has no constitutionally protected property interest in tenure).

Two of his decisions evidenced an inclination to defer, in the face of constitutional challenges, to school board decisions regarding discipline of students (Rose, supra) and to Congress and the President regarding conscription and draft registration (Detenber v. Turnage, 701 F.2d 233 (1983) (rejecting without much analysis a due process challenge to draft registration procedures)).

In one case, Judge Breyer pointedly held back from reaching a more extreme, court-door-slamming position taken by the Fifth Circuit. In Keeton v. Hustler Magazine, Inc., 682 F.2d 33 (1982), Judge Breyer (for a unanimous court) held that New Hampshire did not have personal jurisdiction over Hustler Magazine, whose only contacts with the state were magazines sent into the state for sale by independent distributors, in a libel case brought by a non-New Hampshire resident where the majority of harm occurred outside New Hampshire. Judge Breyer confined his holding to these facts and expressly declined to rule (as had the Fifth Circuit) that non-resident plaintiffs cannot bring libel claims against non-resident publishers.

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Takings/Eminent Domain

Judge Breyer's Fifth Amendment jurisprudence is similarly unremarkable. Two of the three cases concern interpretations and applications of Massachusetts law. Cadorette v. United States, No. 92-1181 (2/22/93) (parsing of Massachusetts law of descent and distribution as applied to inheritance of 4 acres on Cape Cod) and United States v. 125.07 Acres of Land, More or Less, 707 F.2d 11 (1983) (parsing of centuries-old Massachusetts statutes regarding the difference between public and private roads and who has the duty to upkeep as applied to particular road on Cape Cod). The decisions are carefully reasoned and scholarly, but would not be of much interest beyond the parties to the cases. Moreover, they offer no clue as Judge Breyer's view on pivotal Fifth Amendment issues -- what constitutes constitutionally protected "property" and what constitutes a taking.

The third case is interesting because it demonstrates, at least in that context, Judge Breyer's reluctance to reach constitutional issues when statutory grounds for decision apply. It also reflects his hesitance, at least in the context of the case, to interpret the President's constitutional powers broadly. In Cas. T. Main Int'l v. Khuzestan Water & Power Auth., 651 F.2d 800 (1981), the majority held that the President has the power under Article II to suspend and settle a United States company's lawsuit against a foreign company (Iranian) during a time of

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national emergency. Judge Breyer, writing in concurrence, concluded that the constitutional issue was not clear and that the court should have found that the President had the power under existing statutes.

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M E M O R A N D U M

TO: Don Verrilli

FROM: Greg Magarian

DATE: June 7, 1993

SUBJECT: Analysis of Judge Breyer's Civil Procedure Opinions

Overview

Judge Breyer's civil procedure opinions reveal a highly intelligent and thorough jurist without any philosophically driven approach to procedural issues. He appears to prize judicial efficiency and fairness, and his analytic tactics appear aimed toward a common-sense explication of procedural rules that will aid the smooth working of the system. His manner is generally pointed but civil. These opinions reveal nothing of great interest about his ideological bent.

I. Sensitivity, Ideology, and Temperament

None of these opinions contains any language or references that could conceivably offend people of color, women, or other disadvantaged social groups. Several of the cases came to the First Circuit from Puerto Rico, and Breyer consistently displayed a thorough knowledge of and respect for legal precedent from the island, notably in Republic Sec. Corp. v. Puerto Rico Aqueduct and Sewer Corp., 674 F.2d 952 (1st Cir. 1982). In the only racially sensitive case in this group, Isaac v. Schwartz, 706 F.2d 15 (1st Cir. 1983), Breyer rejected on grounds of res judicata a black civil rights

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plaintiff's appeal of the dismissal of his federal claim. Following a loss in an earlier state court proceeding, the plaintiff had attempted to buttress his claim with charges of conspiracy to discriminate, charges of which Breyer appeared dubious.

In general, little in the way of personal ideology is apparent from Breyer's civil procedure opinions. In the only criminal case of the group, Noguiera v. United States, 683 F.2d 576 (1st Cir. 1982), the defendant won. In the civil cases, defendants won more frequently, and in Betancourt v. W.D. Shock Corp., 907 F.2d 1251 (1st Cir. 1990), a statute-of-limitations case, Breyer displayed some antipathy toward plaintiffs' characterizing complaints so as to increase their opportunities to reach court. But in another case, Pujol v. Shearson/American Express, Inc., 877 F.2d 132 (1st Cir. 1989), Breyer kept a plaintiff in court by ruling that a potential defendant whose inclusion in the action would have eliminated diversity jurisdiction was not indispensable.

These opinions revealed no problems with Breyer's judicial temperament. He was frequently critical of parties' arguments or approaches to litigation in the course of ruling against them, but he never crossed the line into sniping. In one case, National Expositions v. Crowley Maritime Corp., 824 F.2d 131 (1st Cir. 1987), he assessed double costs for what he adjudged a frivolous appeal of a summary judgment order. He showed a large amount of respect for district court

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rulings: his highest pitch of criticism for a lower court sounded in Gnapolsky v. Keltron Corp., 823 F.2d 700 (1st Cir. 1987), where he directly but dispassionately noted the imprecision of the district court's findings in the course of remanding the case. He tends to state his conclusions bluntly, but he never adds insult to injury.

II. Judicial Philosophy and Method in Civil Procedure Settings

These opinions do not reveal a strong judicial philosophy. Breyer appears consistently to favor a common-sense approach to procedural issues, with the aim of maximizing judicial efficiency. He avoids rocking the procedural boat. In Nogueira, supra, for example, he rejected the government's attempt to raise a new issue on appeal, in the name of procedural stability. He has regularly rejected petitions for mandamus, making an exception only for defendant judges in In re Justices of the Supreme Court of Puerto Rico, 695 F.2d 17 (1st Cir. 1982), and there only for the elements of the litigation where serious issues of judicial integrity arose. He occasionally nods in the direction of federalism, as when he suggested in Republic Sec. Corp., supra, that the legislature, rather than judicial equity, would be the proper power to allow compound interest in a restitution setting.

Breyer prefers to analyze procedural ambiguities with an eye toward interpretations that will best serve the

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policies--always including judicial efficiency--behind the provisions at issue, as in Pujol, supra, where he identified fairness and efficiency as his criteria in analyzing Rule 19 on indispensable parties. He seasons his analysis with moderate doses of both textual analysis and legislative history. He regularly cites numerous precedents for a point, and he rarely suggests bold or novel interpretations of their meanings. His analysis is consistently intelligent and thorough; in United States v. Hughes House Nursing Home, Inc., 710 F.2d 891 (1983), he displayed a strong facility with the complex regulatory structure that undergirded a statute-of-limitations question. His overall approach is extremely cautious: he refuses to upend precedents or to interfere with the administration of justice without a compelling reason.

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M E M O R A N D U M

TO: Joel Klein

FROM: Tom Perrelli
Michelle Goodman
Elizabeth Cavanaugh

DATE: June 8, 1993

RE: Judge Breyer's Opinions on Banking, Bankruptcy, Civil RICO, Admiralty

We have read all of Judge Breyer's opinions on the abovementioned topics. These subject areas are for the most part dry and uncontroversial. There do not appear to be any major concerns in any of the opinions.

I. General Impressions

Judge Breyer clearly seems in his element when writing about commercial disputes. While his opinions are never exciting, they are extremely lucid and comprehensive. Often, they have a professorial tone, as he attempts to instruct the reader on an area of law. They are often wide-ranging, discussing trends across jurisdictions or over time. From reading the opinions, it is clear that Judge Breyer is a very intelligent man with the ability to explain difficult subject areas with clarity.

These opinions are in sharp contrast to his civil rights opinions which are relatively sparse in substance and discuss no more than is necessary to reach a decision. It is clear that Judge Breyer has considered issues related to banking and bankruptcy, in particular, at length. Whereas one could term his civil rights jurisprudence as "uninterested," his writings in these areas show great care and interest. He discusses all sides of an issue and comes to a reasoned conclusion based primarily on logic.

Indeed, a logical outcome is the key to his decisionmaking. He distinguishes or rejects old precedent when it is illogical or fails in the face of the modern world. His technique of statutory construction is firmly based on his view of what the statute logically means. He often traces the history of successive incarnations of a statute to demonstrate how Congress arrived at the current version and why it chose a certain meaning. When there are gaps, Judge Breyer uses his own logic to fill them in.

II. Subject Areas

A. Banking

In the banking area, Judge Breyer's opinion have focused on two particular areas -- the application of the D'Oench, Duhme doctrine which protects the FDIC from secret side agreements made by the customers of a failed bank and the independence of letters of credit which form part of a larger commercial transaction. The cases reveal no

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particular slant, although they are all both logical and pragmatic.

The common law D'Oench doctrine, now codified, is perhaps the FDIC's most powerful defense and almost certainly the issue which the FDIC most litigates. Many courts have mechanically interpreted the doctrine in order to protect the public fisc, despite the perverse results which such an interpretation creates. Judge Breyer's jurisprudence reflects a more sophisticated understanding of the doctrine and demonstrates his attempt to do Congress' will, even if the language of the statute could be interpreted differently. In his D'Oench cases, he has taken neither a consistently pro-FDIC or anti-FDIC position. See Bateman v. FDIC, 970 F.2d 924 (1st Cir. 1992); Capizzi v. FDIC, 937 F.2d 8 (1st Cir. 1991); FDIC v. La Rambla Shopping Center, 791 F.2d 215 (1st Cir. 1986). Instead, he has applied the doctrine in a sensible manner to each individual fact situation.

The letters of credit cases again reveal no particular perspective, either pro-creditor or pro-debtor, but demonstrate Judge Breyer's breadth of knowledge. He often traces the historical development of a given doctrine in order to explain how it should be applied in a given case. In so doing, he will reject precedent which arguably should bind his decision, because it simply no longer logically applies. See Emery-Waterhouse Co. v. Rhode Island Hospital trust Nat'l Bank, 757 F.2d 399 (1st Cir. 1984); FDIC v. Banco De Ponce, 751 F.2d 38 (1st Cir. 1984). Although he in no way could be characterized as an activist judge, he does appear to have strong ideas about what doctrines are outmoded.

In Itek Corp. v. First Nat'l Bank of Boston, 730 F.2d 19 (1st Cir. 1984), a case which Judge Breyer likes to cite, he permitted a corporation to bring suit in district court for an injunction, despite the fact that the claims properly should have been brought before the Iran Claims Tribunal. His opinion is not overly persuasive, but it seems clear that he believed that, in this particular situation, it was only fair that the corporation get a hearing in a U.S. forum, as the time for bringing claims to the Tribunal had passed.

B. Bankruptcy

Judge Breyer's bankruptcy opinions are extensive. In none of the cases is there a dissent or even a concurrence. His colleagues appear to defer to his thoroughly reasoned decisions. Similar to his writings in the banking context, Judge Breyer seems comfortable in this area. His opinions weigh competing policies and are comprehensive. He appears to have no particular bias, although he often defers to the lower courts. These cases also demonstrate his use of legislative history (with an emphasis on history), see In re Arnold Print Works, inc., 815 F.2d 165 (1st Cir. 1987); In re Saco Local Dev. Corp., 711 F.2d 441 (1st Cir. 1983).

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The only opinions of note are Arnold, 815 F.2d 165, in which he interpreted Article III of the Constitution and the term "core bankruptcy proceedings" to find that the bankruptcy court had jurisdiction over certain claims, and In re Energy Resources Co., 871 F.2d 223 (1st Cir. 1989), in which he held that a bankruptcy court could apply payments to the IRS against one sort of tax owed, as opposed to another, despite the fact that this decision created the very real possibility that the IRS would not recover all of the money it was owed.

C. Civil RICO

All three of the civil RICO cases were appeals from the U.S. District Court for the District of Puerto Rico, and in all three Judge Breyer found for the defendant. See Arzuaga-Collazo v. Oriental Federal Savings Bank, 913 F.2d 5 (1st Cir. 1990); Rodriguez v. Banco Central, 917 F.2d 664 (1st Cir. 1990); Apparel Art Int'l, Inc. v. Jacobson, 967 F.2d 720 (1st Cir. 1992).

Judge Breyer interprets civil RICO narrowly, emphasizing the specific language of the statute in order to defeat the plaintiffs' claims. In two of the three cases he emphasized the plaintiffs' failure to meet procedural requirements and tended to interpret these requirements against the plaintiffs. However, in the most recent case, Judge Breyer affirmed the district court's decision not on the basis of that court's res judicata argument, but on the basis of the inadequacy of the plaintiff's RICO claim. Apparel Art, 967 F.2d at 722. His willingness to address the RICO issue rather than the procedural one suggests an inclination against civil RICO claims in general.

Judge Breyer's decisions are concise and well argued. He often uses specific, hypothetical examples to illustrate his points, making complex statutory issues more understandable. While Judge Breyer appears to be pro-defendant in civil RICO actions, he relies upon well-established precedents in his decisions against plaintiffs. This, combined with the relative unpopularity of civil RICO, suggests that his reasoning is far from radical or reactionary.

D. Admiralty

Judge Breyer's admiralty opinions reveal a detached and unemotional jurist who seems to be more interested in somewhat mechanical, even-handed application of the law than in notions of fairness. He is not at all prone to judicial activism and seems to be hesitant to disturb prior (especially longstanding) precedent, lower court findings of fact, and jury verdicts. Many of his opinions rest on technical issues of procedure or statutory construction, and he seems greatly concerned with issues of judicial economy.

He appears to be reluctant to upset prior precedent, even where very plausible grounds of distinction exist. In Barber Lines A/S v. M/V Donau Maru, 764 F.2d 50

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(1st Cir. 1985), for example, he upheld the dismissal of a tort suit for damages suffered after an oil spill caused the plaintiff considerable expense. He asserted that, despite the existence of three persuasive grounds of distinction in this particular case, longstanding precedent requires that a plaintiff alleging negligence suffer more than mere financial harm. Judge Breyer's opinions also reveal a reluctance to disturb a lower court's opinions and show great deference to finders of fact. See Jordan v. United States Lines, 738 F.2d 48 (1st Cir. 1984) (refusing to overturn a jury verdict despite his acknowledgment that it was a "close case"); Oxford Shipping v. New Hampshire Trading Corp., 697 F.2d 1 (1982) (relying on lower courts finding that the defendant was an "innocent" principle despite substantial evidence that its agents were aware of fraud).

Often, his opinions are based on the narrowest possible grounds. In Cerqueira v. Cerqueira, 828 F.2d 863 (1st Cir. 1986), he rested on his determination that the defendant was not the "owner" of the ship, despite persuasive arguments that the defendant should be considered the constructive owner because the true owner was not a citizen and therefore legally incapable of ownership. See also Hartford Fin. Sys. v. Florida Software Servs., 712 F.2d 724 (1st Cir. 1983) (dismissed on the procedural ground that the decision of the lower court to stay a suit pending arbitration was nonappealable).

Administrative concerns about conserving judicial resources and the cost of litigation seem very important to Judge Breyer. For example, in refusing to allow plaintiffs who have suffered only financial harm to sue for negligence, he stressed the costs of tort suits to the court as well as the plaintiffs and posited first party insurance as a better method of compensation. See Barber Lines A/S v. M/V Donau Maru, 764 F.2d 50 (1st Cir. 1985); see also Ponce Fed. Bank v. Vessel "Lady Abby", 980 F.2d 56 (1st Cir. 1992) (broadly construing a jurisdictional statute to allow pendant party jurisdiction in an in rem action to foreclose on a ship's mortgage for in personam action for deficiency judgment as well as cross claim by a third party).

III. Conclusion

Judge Breyer's opinions in these areas raise no red flags that could threaten his confirmation. They do reveal that he is in his element in commercial and common law. As a Supreme Court justice, he would likely take an interest in these sorts of cases. His opinions also demonstrate that he has an excellent mind and a broad knowledge about both commercial and common law. Although the cases do not in general suggest that he is guided by an inner sense of justice, they do make clear that he has a strong sense of what is logical. This sense guides his decisionmaking, even if it impinges somewhat into stare decisis and strict textual interpretation. He is unquestionably a man guided by logic, not passion.

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001. memo	Don Verrilli to Joel Klein re: Judge Breyer (4 pages)	06/07/1993	P5 6 S 10
002. memo	Judge Breyer to Mr. Scigliano; re: Rowlett v. Anheuser-Busch, Inc. (1 page)	11/05/1987	P6/b(6)
003. fax	To Joel Klein from Jim Hamilton re: Memorandum for Jim Hamilton (5 pages)	06/09/1993	P5 6 S 11

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M E M O R A N D U M

TO: Joel I. Klein

FROM: Don Verrilli

DATE: June 7, 1993

SUBJECT: Judge Breyer -- Opinions on Antitrust and Economic Regulation

This memorandum summarizes my review of the opinions identified on the master list relating to antitrust and economic regulation.[1/] The opinions reveal a powerful intellect, extraordinary judicial craftsmanship, an abiding commitment to intellectual values (with a concomitant tendency toward abstraction and detachment), and a marked skepticism about the wisdom of courts and juries supervising private bargains through the mechanism of the antitrust laws. Indeed, perhaps the most striking feature of Judge Breyer's output in this area is that antitrust defendants won every case in which he authored the court's opinion -- irrespective of how the defendant fared in the district court.[2/]

Overall, Judge Breyer should be considered firmly in the Bork/Posner camp on antitrust matters. His antitrust opinions invariably apply economic analysis and explore the economic underpinnings of the legal rules at issue. He fully accepts the thesis that the Sherman Act is intended to enhance consumer welfare by protecting the competitive process. He repeatedly cites Bork's The Antitrust Paradox for that proposition (as well as for support on more specific issues). He is so strongly committed to the proposition that his opinions do not even admit the possibility of more populist conceptions of the role of the Sherman Act, such as those of Justice Black, or acknowledge the new breed of "post-Chicago school" antitrust theorists who take issue with what they consider overly simplistic models of competitive relations. This does not distinguish Judge Breyer from many contemporary commentators or thoughtful jurists. But he does tend to present the Chicago school model as received truth rather than a contestible premise.

1/ I have not independently confirmed that this is the complete universe of opinions by Judge Breyer on these topics.

2/ In other economic regulation cases, the results were more balanced. FERC prevailed in several rate regulation challenges, but lost in others -- most notably the series of Distrigas cases in the early 1980s.

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Consistent with this view of antitrust, Breyer is extremely chary about recognizing claims brought by competitors,[3/] quick to vindicate legitimate business justifications for conduct that injures rivals,[4/] and generally inclined to write opinions limiting the scope of theories of relief. See, e.g., Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 234 (1st Cir. 1983) (exemplifying all three tendencies). Although his opinions are not doctrinaire, he must be considered a conservative on issues of private antitrust enforcement. Because none of his published opinions involve government enforcement of the antitrust laws, I do not know how far his skepticism extends.

Wedded to this understanding of the purposes of the Sherman Act is acute sensitivity to the institutional role of the courts as supervisors of the private marketplace:

> [U]nlike economics, law is an administrative system the effects of which depend upon the content of rules and precedents only as they are applied by judges and juries in courts and by lawyers advising their clients. Rules that seek to embody every economic complexity and qualification may well, through the vagaries or administration, prove counterproductive, undercutting the very economic ends they seek to serve.

Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 234 (1st Cir. 1983). He has also written that:

> [W]e shall take account of the institutional fact that antitrust rules are court-administered rules. They must be clear enough for lawyers to explain them to clients. They must be administratively workable and therefore cannot always take account of every complex economic circumstance or qualification. . . . They must be designed with the knowledge that firms ultimately act, not in precise conformity with the literal language of complex rules, but in reaction to what they see

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3/ E.g. Allen Pen Co. v. Springfield Photo Mount Co., 653 F.2d 17 (1st Cir. 1981); Clamp-All Corp. v. Cast Iron Soil Pipe Inst., 851 F.2d 478 (1st Cir. 1988).

4/ E.g. Grappone, Inc. v. Subaru of New England, Inc., 858 F.2d 792 (1988); Monahan's Marine, Inc. v. Boston Whaler Inc., 866 F.2d 525 (1st Cir. 1989).

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as the likely outcome of court proceedings.

Town of Concord, Massachusetts v. Boston Edison Co., 915 F.2d 17, 22 (1st Cir. 1987).

The principal product of this sensitivity to the judicial role is a significant concern that antitrust rules may deter price-cutting or other efficient behavior that may injure rivals, e.g. Barry Wright, 724 F.2d at 234 ("we must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition"), and, at a deeper level, a pervasive skepticism about the ability of "antitrust court[s] to supervise the bargain" struck by private actors in the marketplace. E.g. Kartell v. Blue Shield of Massachusetts, Inc., 749 F.2d 922 (1st Cir. 1984).

Judge Breyer has authored several leading antitrust opinions. Barry Wright Corp. v. ITT Grinnell Corp. sets forth the First Circuit's standards for predatory pricing. In a lengthy, lucid opinion that combines Breyer's two principal themes -- consumer welfare and institutional considerations -- he rejected the Ninth Circuit's approach to predatory pricing, which permits plaintiffs to prevail in some instances even if an alleged monopolist is pricing above cost. 724 F.2d at 234. Because price cutting generally enhances consumer welfare -- indeed it is what competition is intended to bring about -- and the situations in which above-cost pricing might be anticompetitive are so difficult to discern through the judicial process, Judge Breyer rejected the Ninth Circuit's more liberal rule. The rule established for the First Circuit in Barry Wright permits predatory pricing to go forward only upon a showing of below cost pricing.

In Grappone, Inc. v. Subaru of New England, 858 F.2d 792 (1st Cir. 1988), Judge Breyer authored a leading opinion explaining the "tying doctrine" in light of the Supreme Court's then-recent decision in Jefferson Parish. The opinion provides a superb explanation of the economic underpinnings of tying law. In Town of Concord, Massachusetts v. Boston Edison Co., 915 F.2d 17 (1st Cir. 1990), Judge Breyer authored a leading opinion explicating the "price squeeze" theory of monopolization and holding that the theory should have little or no application in regulated industries.

His leading opinions share several features. First, they reflect a real desire to rationalize and clarify legal doctrine in a way that benefits practitioners. Second, they involve lengthy exploration of the legal and economic underpinnings of the antitrust doctrine at issue. Arguably, this analysis is largely unnecessary to the decisions of the

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case. In Barry Wright, for example, Judge Breyer's opinion rejecting the Ninth Circuit's approach to predatory pricing was arguably all dictum because he eventually concluded that the plaintiffs could not prevail even under the more lenient Ninth Circuit standard. In Grappone, his discussion of tying, though very useful, was probably unnecessary because the plaintiff obviously failed the test set forth by the Supreme Court in Jefferson Parish. Third, they reveal a strong devotion to craft and suggest that Judge Breyer takes the responsibility of judging very seriously. His opinions invariably explain the reasons for his decision in great detail.

It would appear that Judge Breyer cares very must about antitrust law. He has authored a number of opinions in the area -- including the important ones identified above -- and his opinions are invariably serious and scholarly. His opinions are, however, remarkably detached and analytical. They reflect no passion or commitment to principle. This may be a function of his essentially conservative skepticism about the efficacy of private antitrust enforcement, but I come away from these opinions with the sense that something deeper is at work -- that perhaps Judge Breyer believes deep or passionate commitment to principle is out of place in judging. His opinions lack the quality -- sometimes found in the opinions of Judges Posner and Easterbrook on these subjects -- of visionaries seeking to move the law in the direction of revealed truth. At some level, Breyer's approach is a virtue; I think it is safe to assume that precommitments will not take him over the edge very often.

But I come away with a sense of perhaps excessive detachment or commitment to theory over experience. For example, I have a hard time believing he would have joined the majority in the Kodak v. Image Technical case. His tendency to analyze issues on a highly abstract plane would likely have led him to the conclusion that the plaintiffs' "installed base opportunism" claim was not sufficiently grounded in economic theory. I suspect he will be much more inclined toward the Matsushita approach than to the Kodak approach. That said, I have to admit that the opinions he has authored to date are particularly persuasive and strike me as generally correct.

At bottom, it is likely that Judge Breyer would join Justice Scalia in most antitrust cases. To the extent this appointment influences the development of antitrust doctrine in the Supreme Court, my best judgment is that Judge Breyer's appointment would likely make doctrine less accommodating of private antitrust enforcement claims by competitors. Indeed, because Judge Breyer is such a powerful intellect and has such command of this area of law, the combination of his talents and those of Justice Scalia may be a formidable force.

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MEMORANDUM FOR JIM HAMILTON

Our review of articles written by Judge Breyer has been accomplished over a short period of time and by many people. The purpose of the review was to "spot problems," not to draw a picture of the whole man. It is thus undoubtedly unfair to him and to scholarship in general to make any serious generalizations on the basis of that review work -- except to note that Judge Breyer is obviously brilliant, scholarly, and experienced in dealing with a very wide range of difficult legal issues.

A theme that nevertheless does seem to emerge, from the reactions of quite a few lawyers in this firm to what they have read, is what we might call "bloodlessness." Judge Breyer's writings seem to reveal the workings of a mind that struggles so hard to analyze every problem he is considering within a framework bounded by economic theory or rules of logic that the result seems devoid of emotion and even -- though this surely stretches the point too far -- humanity.

Thus, in the area of the Federal Sentencing Guidelines, Judge Breyer regards incrementally longer sentences as not a very

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serious problem[1/] and argues that the Guidelines were not primarily responsible for increased prison populations and have not seriously interfered with plea bargaining. He may be right as a matter of statistics, but his arguments are scientific and statistical rather than humane and anecdotal. Furthermore, although he raises the question whether the Sentencing Guidelines are "worth the candle," and speculates that the answer is yes because 5-10 years from now they will lead judges to think "more systematically" about needs of the offender and other, more cost-effective humane forms of punishment -- he seems content to let the Guidelines run as a form of experiment in penology without worrying too much about the people upon whom the experiment is being conducted.

In his very recent new book about risk regulation based on the Holmes Lectures, he again displays an instinct for a scientific, mathematical approach to decision making. Here his written views could provoke some controversy: he labels as "tunnel vision" agency insistence on eliminating the last little bit of pollution, complains of "random agenda selection" by agencies that fail to do rational balancing of risks and costs, and speaks of the irrationality of the public's overreaction to low level risks. The solution he advocates is the creation of a

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1/ Responding to the hypothetical of a first offender embezzler who returns the money and apologizes, Judge Breyer regards a month's worth of night and weekend incarceration, where earlier there might have been only probation, as "not long."

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small, centralized group that would be given responsibility for designing a uniform, interagency approach to regulation of risk. It is remarkably similar in concept to the number crunching, let's-get-it-right-once-and-for-all approach embodied in the Sentencing Commission.

In his articles, Judge Breyer confronts the problem of how to deal with those who are injured by regulatory reform, even as the public at large has benefitted. He proposes, for example, a regulation requiring airlines to rehire dislocated workers before hiring new ones and special payments to employees who lose their jobs. But, curiously, the argument he advances for these apparently humane ideas is that, without such compensation, those injured by regulation would continue to assert political pressure to re-regulate.

It is easy to overgeneralize from these few points and tempting to overstate the evidence (if any) about Judge Breyer's "humanity" revealed by his very careful and scholarly writings. It is, indeed, quite possible that Judge Breyer felt himself compelled by his status as a jurist and before that as an academic to scrub his writings free of sentimentality. Nevertheless, especially when Judge Breyer's writings are juxtaposed with the lucid, exuberant and wide-ranging writings of Bruce Babbitt, they seem entitled to the label "bloodless."

James Robertson
Jane Sherburne

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004. memo	Don Verrilli to Joel Klein re: Review (2 pages)	06/08/1993	P5 6514
005. memo	Tom Perrelli and Ian Gershengorn to Joel Klein (9 pages)	06/07/1993	P5 6515

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MEMORANDUM TO THE FILE

Re: Chief Judge Breyer

From: Jenny Lyman/per Swindle & Berlin

I have reviewed 26 First Circuit cases on criminal law or prisoner's rights, in which Judge Breyer wrote the majority or a concurring opinion. I also had these cases checked for later case histories. The Supreme Court did not accept any of them for review.

This limited selection showed nothing flamboyant or provocative. For the most part he writes appealingly clear, succinct opinions, almost always affirming and almost never in favor of the criminal. He works hard, and with integrity, though little creative flair. Fairness and honesty look like high priorities. He takes meticulous care to report facts and arguments opposing his position. (In one opinion, he takes the lawyers to task for giving a misleading impression of the facts in the record, U.S. v. Cordero, 668 F.2d 32, 43 (1981)).

He tends to empathize with, and defer to the institutional players, the trial judges, prosecutors and police, and to identify with their efforts to do the job. Clear failures to do the job, however, try his patience. Thus he shows great deference to prison administrators in Arruda v. Fair, 710 F.2d 886 (1983) (ok to strip search prisoners, even before as well as after internal movement to library, infirmary, where officials combatting flow of drugs and weapons in the prison), but the "appalling" conditions in the Puerto Rican jails, and officials' failure even to "do what they could" to segregate schizophrenic prisoner, showed deliberate indifference supporting 1983 award to mother of murdered prisoner in Cortes-Quinones v. Jimenez-Nettleship, 842 F2d. 556 (1988). See also Morales-Feliciano v. Parole Bd. of Commonwealth of Puerto Rico, 887 F2d 1 (1989)(upholding escalating fines for civil contempt in failure to improve terrible prison conditions, but suggesting officials could request relief in light of recent hurricanes). He does not readily step into the shoes of the criminal defendant, nor always perceive the cumulative impact of the rulings. See, e.g., Guaraldi v. Cunningham, 819 F.2d 15 (1987), (habeas petitioner complaining about trial lawyer's conflict in representing separately tried codefendant; Breyer overlooks the "catch 22" in saying the trial judge did not have to warn of the likelihood of conflict, but defendant's failure to raise conflict at trial level subjected him to high Cuyler standard of proving "actual conflict"). (Opinion attached)

I saw nothing much for conservatives to work with in these opinions; occasionally he found defendants should get more of a hearing, but he never turned anyone loose. Liberal proponents of 1prisoner's rights (??!) may complain, but they too will have a hard time finding anything into which they really can sink their teeth.

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M E M O R A N D U M

TO: Andy Lipps

FROM: Mary Albert

Re: Judge Breyer's Sentencing Opinions

Date: June 8, 1993

Judge Breyer's sentencing opinions are conservative, well-reasoned, generally well-supported with references to the record, Sentencing Guidelines and case law and devoid of controversy. His Guidelines opinions uniformly state that great deference should be accorded to decisions of the sentencing judge and he has vacated and remanded for resentencing only where the Guidelines were not properly applied, the government violated the terms of a plea agreement or there was evidence of a related statutory or constitutional violation that impacted the sentence.

Judge Breyer strictly enforces procedural requirements against both the government and defendants. For example, in one pre-Guidelines case, he remanded where the district court gave the defendant an enhanced sentence as a repeat offender because the record did not reflect that the government had requested the enhancement by filing a pre-trial information setting forth the defendant's prior convictions as required by 21 U.S.C. § 851(a). Breyer stated, however, that resentencing would be in order only if the District Court found or the government clearly conceded that it did not file an information. Hardy v. United States, 691 F.2d 39 (1st Cir. 1982). In cases where defendants did not timely challenge the contents of a pre-sentence investigation

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report as provided in Fed. R. Crim. Pro. 32, he has refused to consider arguments that their sentences were improperly calculated based on information in the reports. See e.g., United States v. Blanco, 888 F.2d 907 (1st Cir. 1989).

None of the opinions that I reviewed contained any discussion of the constitutionality or propriety of the Sentencing Guidelines, either generally or as applied in a specific case. The explanation for this may be found in Judge Breyer's concurring opinion in United States v. Wright, 873 F.2d 437 (1st Cir. 1989) (he also wrote the panel opinion). Wright was the first case involving the Sentencing Guidelines heard by Judge Breyer. He stated in his concurrence that because he was a member of the Sentencing Commission and because many future appeals would involve Guidelines issues, he wanted to "consider the question of recusal systematically and in writing." He asked both the United States Attorney and the Federal Public Defender to submit amicus briefs addressing the appropriateness of his hearing appeals in Guidelines cases.

Neither the U.S. Attorney nor the Public Defender's office believed that Breyer should recuse himself in most Guidelines cases, including Wright. Based on their submissions, Breyer concluded that he would not automatically recuse himself in typical Guidelines cases, unless they involved serious legal challenges to the Guidelines themselves. Accordingly, to his credit, Breyer has declined to hear any cases challenging the

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substance or applicability of the Guidelines in order to avoid even the appearance of a conflict of interest.

Nonetheless, several of Judge Breyer's opinions contain language reflecting a perspective on the Guidelines that could be said to have only resulted from his service on the Sentencing Commission:

-- In United States v. Wright, Judge Breyer determined that the appropriate level of appellate review in Guidelines cases involving mixed questions of law and fact is the "clearly erroneous" standard. Although this may have been the correct result, he provided a rather questionable basis for the holding:

> ...more intensive appellate review might hinder the [Sentencing] Commission's legal power and expressed intention to collect information about how the district courts apply the Guidelines and to revise them in light of what it learns.... Too intrusive a standard of appellate review could impede the Commission's efforts to learn from the district court's experience.

873 F.2d at 444.

-- In United States v. Mahecha-Onofre, 936 F.2d 623 (1st Cir. 1991), Judge Breyer addressed the statutory and Guidelines requirement that in drug cases, the weight of a mixture or substance containing any detectable amount of contraband should be considered in sentencing. The defendant had been arrested with suitcases made of cocaine bonded chemically with acrylic suitcase material. Breyer rejected the defendant's argument that the district court should have considered only the weight of the cocaine itself (2.5 kilograms) rather than the

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total weight of the suitcases in determining his sentencing level. Again, although this may have been the correct result under the Guidelines, Judge Breyer stated rather gratuitously, with no citation to any authority, that:

> [O]ne reason why Congress and the Sentencing Commission have specified that courts not consider drug "purity" in imposing sentence is that "weight" and "purity" both, roughly speaking, correlate with the seriousness of the crime. That is to say, a defendant who has more of the drug is also likely to have purer drug (not in every case, but, very roughly speaking, in many cases). Hence Congress determined that the effort to determine purity is not worth the extra precision (in terms of correlating punishment with crime seriousness) that doing so might produce. Insofar as Congress engaged in that kind of reasoning, it is worthwhile pointing out that the effort required to created a chemically-bonded cocaine/acrylic suitcase suggests a serious drug smuggling effort of a sort that might warrant increased punishment.

936 F.2d at 626 (emphasis in original).

-- In fairness, Judge Breyer also has used his expertise on the Guidelines to provide sound advice to prospective defendants contemplating plea bargains with the government. In the Wright and United States v. Mak, 926 F.2d 112 (1st Cir. 1991) opinions, he noted that, because the Guidelines base sentences in drug cases on the amount of drugs possessed, "charge-type" plea bargains (where the defendant pleads guilty to less than all counts charged) generally will not be beneficial to a defendant. Judge Breyer advised that, in order to benefit from plea bargaining, a drug defendant should obtain an agreement from

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the government on sentence length, not simply to drop related counts.

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M E M O R A N D U M

TO: Joel I. Klein

FROM: Don Verrilli

DATE: June 8, 1993

SUBJECT: Review of Judge Breyer's Opinions

Attached are the following memoranda reviewing Judge Breyer's opinions in the topic areas you identified:

David Ogden	First Amendment
Tom Perrelli	Civil Rights
Greg Magarian	Civil Procedure
Don Verrilli	Antitrust

Ann Kappler is analyzing the miscellaneous constitutional law cases. Her analysis is not yet complete. She will messenger the memo to you as soon as it is complete. If you need to reach her tuesday morning, her number is 639-6019.

Some general observations are possible based on our review. First, Judge Breyer's intellectual power and commitment to the judicial craft are exceptional. His opinions are lucid, richly referenced and almost pedagogical in their desire to rationalize and clarify -- although these qualities are reflected more often in subject areas in which Judge Breyer is intellectually engaged. He can fairly be characterized as a political moderate, though the opinions we reviewed contained more that will please conservatives than will please liberals. In particular, his views on antitrust law are squarely in the Bork/Posner consumer-welfare, law and economics camp, and his decisions interpreting federal antidiscrimination statutes have tended to result in denials of relief for procedural reasons. His First Amendment views are decidedly more moderate. He has vindicated important First Amendment claims, particularly when political speech or rights or conscience are involved. Many of his cases reject First Amendment claims, but do so in cases arising out of political firings of government employees in Puerto Rico, which is not an appropriate barometer of his general First Amendment direction.

His judicial philosophy is not easily cabined. Some reviewers found that he emphasized the practical over the theoretical, and decided cases on narrow grounds. That was particularly true in the First Amendment context, where Judge Breyer typically resorted to forms of ad hoc balancing to resolve cases. Others found him more wedded to abstract logic, theoretical perspectives and broad pronouncements that exceeded what was required to decide the case at hand. That was particularly true in the antitrust context. Several

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unifying themes can be extracted, however. One important characteristic of his intellectual makeup is skepticism about courts' ability to intervene effectively to vindicate important interests. Although that theme expresses itself in a case-specific balancing approach to the First Amendment and in an (apparently antithetical) broad theoretical approach to antitrust enforcement, in both instances Judge Breyer appears to doubt the courts' ability to improve the world, and is acutely conscious of the risks of counterproductive results when courts do intervene. Another important characteristic is the seriousness with which he takes governmental interests in the First Amendment and civil rights contexts. Although that sometimes tends to work against liberal interests in these contexts, it may suggest a generally deferential attitude toward government regulation seeking to advance liberal social policy objectives.

One consistent reaction among reviewers was a sense of disquiet about the extreme detachment reflected in Judge Breyer's opinions. On the positive side, that may reflect a serious commitment to intellectual values -- to faith in reason and rational explanation. However, nothing in the opinions we reviewed revealed any deep convictions or passions. That does not necessarily bode ill for his willingness to enforce the civil rights laws, but it is difficult to imagine Judge Breyer as the author of the next Brown v. Board of Education.

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M E M O R A N D U M

TO: Joel Klein

FROM: Tom Perrelli
Ian Gershengorn

DATE: June 7, 1993

RE: Judge Breyer's Civil Rights, Privacy and National Security Opinions

I. General Impressions

We have read Judge Breyer's opinions on all forms of discrimination and civil rights issues, as well as his dissent in an abortion case, and two miscellaneous constitutional law opinions denoted "other" on the list of cases. In addition, We have read three of Judge Breyer's opinions on national security issues.

Although this sample is small, it is most remarkable that virtually none of the cases turn on substantive issues of law. In almost every cases, procedural issues or administrative law questions predominate. We do not know whether there are other opinions in these subject areas which fully set forth Judge Breyer's views. For purposes of this memo, we have assumed that there are no other opinions in these subject areas.

The procedural nature of these opinions suggests several conclusions. Judge Breyer is known to be an administrative law expert and perhaps his colleagues defer to him on these issues. He may also volunteer to write the opinions in these areas because of his expertise and interest. Most of the cases are relatively straightforward and without dissent. Nonetheless, the dearth of commentary about the substantive issues at stake indicates that Judge Breyer has no real interest in the area of civil rights; it is all but impossible to imagine him being an innovator on the Supreme Court on these issues. He may well be fair and impartial, but he brings no passion or insight into the field. Although he has strong views in other areas, such as antitrust, he does not appear to have any particular judicial or political philosophy in the civil rights area. One cannot envision him being a staunch defender of civil rights. Nothing in his jurisprudence will give racial and ethnic minority groups, or the elderly or handicapped, much to cheer about.

Indeed, his opinions suggest an individual who falls somewhere between moderate and conservative on the ideological spectrum. He appears at times to have more sympathy for the burden on administrative agencies than on the individual plaintiff. See Ward v. Skinner, 943 F.2d 157 (1st Cir. 1991) (denying individualized inquiry for a driver's permit to epileptic who took anti-seizure medication

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and who had not had a seizure in seven years). The results in these cases are often reasonable and perhaps legally correct, but there is such a lack of vigor in his jurisprudence that one suspects he does not have (or refuses to utilize) any innate sense of justice. He applies the rules in a dispassionate manner and moves on to the next case. In no way is he a "man of the people," as some other candidates have been.

We saw nothing radical in any of his opinions that would suggest that he is outside the mainstream. Nor did we see anything that would characterize him as a liberal. In a few cases where a liberal judge would have taken advantage of a clear opportunity to do substantive justice, Judge Breyer declined on procedural grounds. He clearly prefers the plodding application of law to any effort to reach substantive justice. In this way, he is certainly a judicial conservative.

He uses a wide range of tools in statutory construction in an attempt to be faithful to the intent of Congress. In this way he is far closer to the jurisprudence of Justice Stevens than that of Justice Scalia. See Cousins v. Secretary of United Stated Dep't of Transportation, 880 F.2d 603 (1st Cir. 1989) (en banc). He places a great deal of importance on the APA and sees it as a flexible tool for reviewing government action; his vision of the APA is likely broader than the conservative justices on the current Court.

He appears to revere logic and prefer the abstract world of law to the messy realm of fact. He often leaved factual issues to the lower courts which he could just as easily have resolved. He also allows logic to cloud of his view of the facts. At times he rejects a party's argument on a factual issue because he does not believe that the facts could logically be such. If, for example there is no record evidence, he occasionally makes a "logical" assumption, even if a party argues that there might be something more if the lower court had simply investigated further. See Lopez v. Citibank, 808 F.2d 905 (1st Cir. 1987). It is difficult to provide a clear example of this sort of analysis, but it shows an abstract quality of thought that is fine for an academic, but is somewhat more problematic for a Supreme Court Justice.

Finally, interest groups may have serious problems with Judge Breyer. In particular, his views on abortion are by no means clear and the only opinion on the issue bodes ill for future cases analyzed under Justice O'Connor's undue burden test. See Planned Parenthood v. Bellotti, 868 F.2d 459 (1st Cir. 1989). In addition, a couple of comments in sex discrimination are sufficiently uncharacteristic that they may suggest a lack of seriousness about issues of concern to women in the workplace. His views on racial discrimination and affirmative action appear to be moderate, but the opinions provide no clear guide in this area. See Stuart v. Roche, 951 F.2d 446 (1st Cir. 1991). His record on issues of concern to both the elderly and the disabled is

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also not particularly good. See Wynne v. Tufts Univ. School of Medicine, 932 F.2d 19 (1st Cir. 1991) (en banc). Because most of these opinions do not deal with substantive law, it is difficult to discern Judge Breyer's true views. Nonetheless, from what one can glean, it does not appear that he will be a candidate of choice for any of these groups.

II. Civil Rights Cases

A. Age Discrimination

Judge Breyer's age discrimination cases reveal nothing startling. His opinions have not, however, vindicated the rights of the elderly. In EEOC v. Commonwealth of Massachusetts, 864 F.2d 933 (1st Cir. 1988), he held that motor vehicle examiners were "law enforcement officers" for purposes of an exception to the ADEA. This opinion makes sense on the facts (examiners had some law enforcement functions), but Judge Coffin's dissent suggests another course which a more liberal judge likely would have taken; the appeals court could have remanded for a determination of whether the examiners jobs were primarily related to law enforcement activities and whether there were some examiners who performed no law enforcement function. Judge Breyer's opinion glosses over some unclear issues and is some evidence of his apparent concern that government not be overburdened by having to make too many distinctions.

In Schuler v. Polaroid Corp., 848 F.2d 276. Judge Breyer upheld summary judgment against a man who alleged he had been forced out of his managerial position at Polaroid. The plaintiff's position had been abolished, but he was offered a grossly inferior job, albeit at the same salary. Judge Breyer dismissed on the ground that the plaintiff could not show that a younger person had gotten the job -- the position had been abolished. Further, it was not clear from the evidence how much of his job functions were being performed by the person who held the position into which plaintiff's job had been consolidated. Judge Breyer rejected the anecdotal evidence which plaintiff provided as insufficient to present a prima facie case. The record did appear to be thin, but the opinion demonstrates no particular solicitude for the concerns of the aged.

B. Discrimination Against the Handicapped

The five opinions on discrimination against the handicapped are similarly unremarkable, except that they essentially turn on procedural grounds. In Lopez v. Citibank, 808 F.2d 905 (1st Cir. 1987), Judge Breyer held that mental incapacity does not toll the statute of limitations for an employment discrimination case. In this case, plaintiff alleged that the defendant's actions had caused insanity and required institutionalization. Judge Breyer rejected a per se rule, and instead engaged in a brief fact-specific inquiry to decide if tolling would be equitable. He refused to toll the statute of limitations (and hence dismissed the claim) because plaintiff had been

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represented by counsel who should have known to bring the suit, even though the plaintiff was incapacitated. Judge Breyer assumed that the attorney would have known the plaintiff's wishes, despite a lack of a record on this point.

More disturbing, however, is his dissent in Wynne v. Tufts Univ. School of Medicine, 932 F.2d 19 (1st Cir. 1991) (en banc) (attached). In this en banc case, the majority held that a medical school should have considered more options to make a reasonable accommodation for a dyslexic student who had great difficulty with multiple choice exams, but did well on other exams. The facts demonstrate that the school gave the student several opportunities to pass his exams, but did not exempt him from multiple choice exams. Further, the school asserted that multiple choice exams have value independent of the substantive areas tested. The majority did not order the school to do more, but required it to consider other options and then make a decision as to what a reasonable accommodation would be under the Rehabilitation Act.

Judge Breyer dissented, upholding the reasonableness of the school's action, in part on the ground that the courts should not overly interfere in the professional judgments of academics. He also noted that the plaintiff's "particular disability, a psychological learning disadvantage, is closely related to the kind of characteristic, namely an inability to learn to become a good doctor, to which Tufts reasonably, and lawfully, need not 'accommodate.'" Id. at 30-31 (Breyer, J., dissenting). This statement reflects a serious misunderstanding of the nature of dyslexia (the opinion is unclear as to whether the plaintiff has other problems as well). It will be seen by the community of disabled people as very insensitive because it suggests that those with learning disabilities cannot overcome them and indeed should not even be permitted access to the education necessary to attempt to overcome such disabilities. Perhaps we put too much emphasis this stray remark, but too much emphasis is just what it might get in certain circles.

As noted above, Judge Breyer held that the Department of Transportation need not conduct an individualized inquiry in cases seeking a waiver of general rules. See Ward v. Skinner, 943 F.2d 157 (1st Cir. 1991). He has also held that § 504 of the Rehabilitation Act does not create an implied private right of action and that the proper recourse for a plaintiff against a federal agency is defined by the APA. See Cousins v. Secretary of United Stated Dep't of Transportation, 880 F.2d 603 (1st Cir. 1989) (en banc).

C. Race Discrimination and Affirmative Action

Judge Breyer's opinions on racial issues have been confined to unusual areas of the law. I read no opinion interpreting Title VII or any anti-discrimination statute. In Fudge v. City of Providence Fire Dep't, 766 F.2d 650 (1st

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Cir. 1985), he concurred in an opinion dismissing plaintiff's race discrimination claim because the only evidence -- one year of test scores -- was statistically insignificant. Judge Breyer's concurrence went out of its way to emphasize how little evidence there was.

In two cases, Judge Breyer upheld consent decrees containing affirmative action provisions against challenges brought by white plaintiffs. See Stuart v. Roche, 951 F.2d 446 (1st Cir. 1991) (attached); Massachusetts Ass'n of Afro-American Police, Inc. v. Boston Police Dep't, 780 F.2d 5 (1st Cir. 1985). In Stuart, Judge Breyer rejected the broadest interpretation of the Supreme Court's Croson decision. In analyzing the consent decree governing promotion in the Boston Police Department, he did not require a judicial or administrative finding of discrimination to satisfy the "compelling state interest" prong; most political conservatives would require such a finding before a race-conscious remedy could be implemented. Rather, he held that the compelling interest test was satisfied by a "strong basis in evidence" (Justice Powell's formulation in Wygant) that there was discrimination. This formulation provides more latitude for states to implement affirmative action programs. It suggests that he would be a moderate on the court on issues involving the use of race in governmental decisionmaking.

Judge Breyer's love of the APA appears again in NAACP v. Secretary of Housing & Urban Development, 817 F.2d 149 (1st Cir. 1987). In this case, he held that, although there is no private right of action permitting enforcement of the requirement in the Fair Housing Act that HUD "affirmatively further" the policies of the Act, HUD actions could be reviewed under the APA for failing to so "further" the Act's policies. He found that there were sufficient standards to permit judicial resolution of the issues raised. This opinion indicates that Judge Breyer believes that the APA is an all purpose tool for challenging government action. The conservatives on the Supreme Court would likely have rejected any attempt to enforce this provision by a private party; in contrast, liberal justices might have found a private right of action in the substantive statute. In turning to the APA, Judge Breyer presents a compromise solution -- plaintiffs can obtain some relief, although the procedural regime is an uphill battle because of the high "arbitrary and capricious" standard which they must meet.

Lastly, in Munoz-Mendoza v. Pierce, 711 F.2d 421 (1st Cir. 1983) (attached), Judge Breyer held that some members of the Boston community, but not all, had standing to challenge HUD's failure to complete an extensive study on the effects of the Copley Place project on local neighborhoods. This opinion is not particularly special, but Judge Breyer maintains standing for some residents on the ground that those residents would be injured-in-fact because their ability to live in an integrated community would be harmed. Thus, racial segregation is a "harm." This notion is

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unexceptional, but Judge Breyer uses it to deny standing to Asian residents of a highly Asian community. Because the Copley Place development will force poor Asians out of predominately Asian community, there will be greater integration, and thus no harm. It seems unlikely that greater integration is what these plaintiffs sought; they likely hoped to preserve their community. This opinion is probably too obscure to matter much, but anyone who reads it closely will find the result perverse and might question the "integration is good"/"segregation is bad" rationale, which becomes a justification for tearing up communities.

D. Voting Rights

Judge Breyer's only voting rights opinion , Latino Political Action Comm. v. City of Boston, 784 F.2d 409 (1st Cir. 1986), came in 1986, just before Thornburg v. Gingles, which fundamentally altered voting rights jurisprudence. This opinion is generally reasonable, although his holding that an 82% minority district was not "packed" is contrary to most decisions.

E. Sex Discrimination

Breyer's opinions on sex discrimination are also unremarkable. They seem to be influenced to a great degree by the rulings of the district court below. In part, this reflects the fact that the cases primarily raise issues of fact (e.g. requests to reverse factual findings for clear error) and not sweeping issues of law. Breyer's desire to rely on the findings of the lower courts is also reflected in his willingness to remand to the district court to get its findings on the record.

In Stathos v. Bowden, 728 F.2d 15 (1st Cir. 1986), Judge Breyer affirmed the district court's finding of discrimination and even included language that showed a measure of skepticism and even contempt toward the defendants. See Stathos, 728 F.2d at 20.

In Lamphere v. Brown University, 798 F.2d 532 (1st Cir. 1986), Judge Breyer showed himself willing to interpret a Title VII consent decree according to its purpose, even though it embodied a form of "affirmative action." Lamphere, 798 F.2d at 536-37. Moreover, he was willing to overlook -- to the plaintiff's advantage -- technical violations of the consent decree and interpret the events in light of the decree's broader purpose. Id. at 538-39. Thus, despite ample opportunity, he did not attempt to construe the consent decree in such a way as to disadvantage the plaintiff. Much of this opinion does, however, appear to signal to the lower court that it should find the university not liable on the remaining claims. Although there is no clear statement to this effect, Judge Breyer spends a great deal of time detailing the university's argument for non-liability. In the second Lamphere case, 875 F.2d 916 (1st Cir. 1989), Judge Breyer stuck to well-traversed sex discrimination law, although a liberal judge could have found many ways to hold

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for the plaintiff. He is clearly not an innovator in this area of law.

The only possible concern in these cases is a stray comment in one of the cases about a potentially sexist comment directed toward the plaintiff. In Dragon v. State of Rhode Island, Department of Mental Health, Retardation & Hospitals, 936 F.2d 32 (1st Cir. 1991), plaintiff testified that when she left, her supervisor made a "joke or a comment" asking if she "knew of anybody that wanted to take over the position, another bubbly blond or nice blond." Id. at 34. Judge Breyer noted that the significance of the remark was diluted by her own testimony that she could think of no other remark that showed condescension towards women. Judge Breyer then noted that "[T]hus, the remark about a 'bubbly blond' is isolated and of next to no probative value -- a swallow that simply does not make a summer." Id. at 35. The tone, if nothing else, is a bit dismissive and certainly out of character for Judge Breyer's characteristically dry opinions. A similarly dismissive comment occurred in Lamphere. In rejecting plaintiff's challenge to some of the university's evidence concerning the reasons behind a tenure vote, Judge Breyer observed that "life, unlike law, does not always present its reasons in neat packages." Lamphere, 875 F.2d at 922. Once again, the words are not on their face damaging, but they are uncharacteristic for Judge Breyer, and may indicate a lack of seriousness toward some areas of great importance to women.

III. Privacy

The only case in the privacy section may be a real problem for Judge Breyer. In the ongoing saga of the Massachusetts parental consent statute, Planned Parenthood and other plaintiffs sought federal court review of the statute as it actually operated. See Planned Parenthood League of Massachusetts v. Bellotti, 868 F.2d 459 (1st Cir. 1989) (attached). The Supreme Court had already approved the statute, but the plaintiffs sought to demonstrate that, as it actually operated, it burdened the rights of women to obtain an abortion. The majority held that plaintiffs could bring their suit to federal court and that none of the abstention doctrines applied, despite the fact that, to some extent, plaintiffs' claims asked the federal court to watch over the actions of state courts. Judge Breyer dissented, arguing that there simply was no way that plaintiffs could prove their case because the Supreme Court had already made clear that the particular provisions at stake were constitutional. Although this decision might simply be based on adherence to precedent, it is of grave concern if the regime in abortion cases will be Justice O'Connor's "undue burden" test. Judge Breyer's opinion suggests a refusal to look at the particular facts of the case and the practical burdens which women face in obtaining an abortion in the face of state laws designed to restrict and discourage. The opinion intimates no opinion on the more general right to an abortion, but it appears more

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likely than not that pro-choice advocates will have serious concerns about Judge Breyer's views on the issue. To the extent that the abortion debate will move away from attempts to overthrow Roe and toward a host of restrictive state laws, the dissent indicates that Judge Breyer would uphold state laws based on abstract principles despite hard evidence that they are burdensome to women.

IV. Armed Forces and National Security

The only opinion of relevance is Hager v. Secretary of Air Force, 938 F.2d 1449 (1st Cir. 1991). Judge Breyer concurred in the court's reversal of the Air Force's determination that the plaintiff, a doctor who had agreed to join the Air Force after medical school, was not a conscientious objector. The Air Force had rejected his claim in great part because he had suddenly discovered his religious beliefs just before he was required to enter the Air Force. The majority opinion stretched its logic quite far in order to prevent a remand and ordered that the individual be given conscientious objector status. Judge Breyer limited the opinion in his concurrence. Nonetheless, given the President's current relationship with the Armed Forces, this opinion may be of concern. It is clear that no one in the Air Force believed this man's story and it does not sound that plausible as described by a judge who did believe it. The plaintiff could easily be seen as a person who shirked military service.

V. Conclusion

There is very little heart and soul in Judge Breyer's opinions. Quite clearly, he is a rather cold fish. There is nothing in his legal writing that suggests innovation, except perhaps in a few areas of particular interest. Indeed, he shows a distinct lack of interest for most areas of substantive law, including those areas of greatest interest to liberals. He would never be a conciliator or a consensus builder on the Court; not only does he lack interest in many subject matters, but his opinions do not reflect the sort of verve necessary to build coalitions.

Conservatives will be thrilled if Judge Breyer is appointed. He cannot be described as liberal and more likely falls on the conservative side of moderate. I would think liberals would be very upset at this selection. Besides the specific problems discussed above, Judge Breyer signals no particular change in the Court's current direction. At most he is another unremarkable voice in the middle, which will still be led by Justice O'Connor or perhaps Justice Souter. His personality will also not generate supporters; nothing in his opinions suggests warmth in any way.

On the whole, he is probably easily confirmable, despite opposition from the left. Selection of Judge Breyer may be seen as a sign that partisanship has no place on the Supreme Court, although it may also appear to be kow-towing

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to conservatives in the Senate. Nothing in Judge Breyer's opinions suggests that he would be a great Supreme Court justice. It seems unlikely that he would change the Court's direction or add any new dimension to it. He is a solid, intelligent choice, albeit one with little feeling or passion.

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001. schedule	re: Schedule for Ruth Bader Ginsburg (partial) (1 page)	07/10-19/1993	P6/b(6)
002. memo	Ron Klain to Howard Paster re: Committee Questioning (18 pages)	07/19/1993	P5 6437

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July 19, 1993

MEMORANDUM FOR HOWARD PASTER

FROM: RON KLAIN

SUBJECT: LIKELY AREAS OF COMMITTEE QUESTIONING

Here are the likely areas of Judiciary Committee questioning, based on our most current intelligence. The list comes close to 100 areas of questioning planned by the Senators, covering about 50 different topics.

Chairman Biden

A. First Round

(1) **Interpretative Theory:** General questions on method, based largely on the Madison Lectures. How do you decide when to recognize a right? Why should public reaction matter; when is it OK for the Court to get ahead of the country (Brown) as compared to when it should not do so (Roe)? If Brown was the product of incrementalism, should it have been decided earlier? What are your views on Scalia's footnote six in Michael H?

(2) **Unenumerated Rights/Right to Privacy:** What is the constitutional basis for the right to privacy? Do you believe there is a right to privacy? Is it a fundamental right? How do you interpret the liberty clause of the 14th Amendment? Do rights predate the government, or exist only by government action?

(3) **Right to Die:** Possible questioning on this application of privacy cases; how would RBG approach this issue?

(4) **Reproductive Rights:** Is abortion a fundamental right? How would RBG's equal protection approach change the extent of protection for such rights? What does RBG's brief in Struck tell us about her privacy views?

B. Second/Third Rounds

(5) **Separation of Powers:** RBG's view on this; her dissent in In re Sealed Case; her views on Chevron deference.

(6) **Free Exercise:** Smith and progeny; RBG views on Smith (akin to Souter); RBG's decision in Goldman.

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Senator Hatch

(1) **Judicial Activism vs. Restraint:** Is Ginsburg a moderate in substance, or just style? Is her reputation for restraint undeserved, as a product of her place on a court bound by precedent? Is she a closet activist?

(2) **Specific Cases:** Two are being studied -- Horhi, as evidence of RBG's "activism;" and Ross, a "soft-on-crime" and "activist" case.

(3) **Statutory Rape Comment:** Why did RBG seek to strike relevant sentence from ACLU policy? Does she believe statutory rape laws are per se unconstitutional?

(4) **Separation of Powers:** RBG's view on this; her dissent in In re Sealed Case? Does she believe that any limits exist -- and what are they?

(5) **Religious Freedom:** Hatch is critical of Smith; will seek RBG's views. Hatch is also very pleased with RBG's view in Olsen that the government can ban marijuana under the compelling state interest test; will raise this to prove that the Religious Freedom Restoration Act is not inconsistent with anti-marijuana laws.

(6) **Death Penalty and Crime:** Constitutionality of the death penalty; habeas corpus reform; constitutional status of Miranda and the Exclusionary Rule.

(7) **Standing:** Are RBG's views as "liberal" as they appear to be in Wright or Spann?

(8) **Vetters:** RBG's experience with outside vetters; confirmation helpers; conflicts of interest and recusals.

(9) **Affirmative Action:** Do "benign" classifications get strict scrutiny? Does RBG stand by her Bakke brief? What are the "other justifications" (beyond remedial) that RBG was referring to in O'Donnell to justify set asides?

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Senator Kennedy

(1) **Discrimination:** How has RBG's personal experience as a victim of discrimination affected her? How do you advise others to deal with this challenge? Which specific experiences have affected you the most?

(2) **Affirmative Actions:** What are RBG's views on remedies and affirmative action? What are the alternative justifications for set asides that RBG was referring to in O'Donnell?

(3) **Privacy and Abortion Rights:** Shouldn't the Court have stepped in front of the political process to protect womens' rights? How do you compare Brown and Roe? What about the women who would have had to wait years more for their rights if Roe had been a more measured opinion? What are RBG's views on public funding?

(4) **Civil Rights:** RBG is clearly aware of gender discrimination; is she sensitive to other sorts of discrimination? There will be questions that praise RBG's decision in Spann?

(5) **Free Exercise:** Kennedy will praise RBG's decision in Goldman, and ask her to comment on it. He will ask about the distinction between legislative prayer and school prayer.

(6) **Free Speech:** Kennedy will attempt to demonstrate that RBG's decisions in ACT and CCNV are squarely in the mainstream. Weren't you just doing your job when you protected the rights of people to state unpopular views?

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Senator Thurmond

(1) **Death Penalty:** Is it constitutional? Constitutionality of non-homicidal death penalty; racial discrimination and the use of statistics to challenge this penalty.

(2) **Habeas Corpus Reform/Finality:** Agreement with Teague, Butler; general problem of a lack of finality in capital cases; views on legislative reforms.

(3) **Gay Rights:** Bowers; gays in the military; equal protection for gays; affirmative action for gays.

(4) **ACLU Generally:** Attack on controversial ACLU policies and any RBG connections to them.

(5) **Second Amendment:** Does RBG support it? To what extent does it guarantee rights for individual gun owners? (May attack ACLU policy?)

(6) **Tenth Amendment:** General support for states' rights; How does RBG interpret the Tenth Amendment?

(7) **Obscenity:** General doctrinal issues and the power of Congress to regulate indecent speech.

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Senator Metzenbaum

(1) **Abortion Rights:**

(a) Roe said that there was a fundamental right to an abortion -- Casey cut back on that. Is there still a fundamental right to choose?

(b) How would employing equal protection analysis modify the outcome in Casey? Could equal protection analysis give women more protection than the "undue burden" standard? What equal protection level of review would RBG apply -- strict scrutiny or intermediate scrutiny?

(c) What was the evidence that state laws were being reformed at the time of Roe?

(2) **Rutgers Comment:** Why did you decline to join Judge Bork in Dronenberg, and yet then defend him at Rutgers?

(3) **Antitrust:** Overall approach; controversial RBG decisions on Court of Appeals. How does RBG defend her decision to join Bork in Rothery? How much importance does RBG place on economics in antitrust? Can economic theory alone lead to a conclusion that there has been no antitrust violation? Is efficiency alone a justification for an antitrust violation?

(4) **Criminal Law:** How should federal courts deal with evidence of innocence in capital cases (cf. Herrerra)? Shouldn't this be a grounds for habeas relief, always, notwithstanding procedural bars? And how can RBG justify her recent vote in the en banc sentencing case that "penalized," under the guidelines, a defendant's decision to go to trial?

(5) **Labor Issues:** RBG decisions that have been criticized by labor groups (ConAir and St.Francis). Doesn't RBG acknowledge that there may be times when a fair election is impossible? Would she ever approve a bargaining order when there was something short of a card majority?

(6) **Attorneys Fees:** RBG has approved an award of attorneys fees to pay for the preparation of a bill. Metzenbaum is critical of the excesses in such fees in bankruptcy cases. He may ask whether RBG shares this concern?

(7) **Access to the Courts:** RBG standing cases; RBG private-right of action cases; RBG's response to charge that she uses "technical" barriers to keep persons from court.

(8) **Legislative History:** Does RBG think it useful in statutory interpretation? Metzenbaum will praise RBG's decision in the Detroit Newspapers case.

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Senator Simpson

(1) **Abuse of Asylum:** What limits does Due Process place on government's ability to end abusive claims of asylum? Does Constitution require us to let undocumented aliens "run free" in the U.S.?

(2) **Confirmation Process:** RBG's views of the process? Her Illinois law review article? RBG's criticisms of the attacks on Judge Bork?

(3) **Selection Process/Litmus Tests:** What questions was RBG asked by vetters, White House, or the President? Were litmus tests applied?

(4) **Gay Rights:** Are the analogies between the gay rights movement and the civil rights movement fitting? Should blacks be upset about use, by gays, of their rhetoric?

(5) **RBG Role on Court as a Woman:** How does RBG see her role on the Court, as a woman? (Comparison to Justice Marshall's special role on race issues.)

(6) **Race v. Gender:** What are differences in equal protection analysis in these two areas? What gender distinctions would be invalid, that would be invalid if based on race?

(7) **Freedom of Speech:** RBG's views generally; RBG's vote with Judge Bork in Evans v. Ollman.

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Senator DeConcini

(1) **Gender and Equal Protection:** RBG's approach in general; levels of scrutiny; RBG's view of Stevens' approach; practical applications of strict scrutiny for gender. [This will dominate DeConcini's questioning.]

(2) **Court as Leader:** Why did RBG believe that the Court should had led in Brown, but not in Roe? What does this say about her views as a judicial activist? (Note that DeConcini is anti-choice, and "anti-activism"?)

(3) **Statutory Interpretation:** What is RBG's approach? How does she use legislative history? Is she in Scalia's absolutist camp, against the use of legislative history?

(4) **ERA:** Does RBG believe an ERA is still needed? How does she reconcile her political view that ERA is needed, with her legal view that strict scrutiny is the rule under the Equal Protection Clause?

(5) **Asset Forfeiture:** What is RBG's view of recent Supreme Court cases in this area? Does she agree that the Eighth Amendment applies to this civil sanction?

(6) **Race and Equal Protection:** DeConcini is likely to ask some questions of concern to Hispanics -- i.e., Do RBG's views on race, which seem largely to concern the historical problems faced by blacks, encompass an understanding of the plight of Hispanics?

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Senator Grassley

(1) **Property Rights:** When do environmental laws (e.g., wetlands regulation) go to far? Is the rule complete deprivation of value, or something short of that?

(2) **Victims' Rights:** What is RBG's view on "victims rights"? What about victim impact statements (Booth)?

(3) **Judicial Activism:** Is RBG an activist? Does she accept the idea of "original intent?" What is her view on stare decisis?

(4) **Statutory Interpretation/Legislative History:** Does RBG accept Scalia's view on legislative history (Grassley does not)? What is her approach?

(5) **Ninth Amendment:** What is the meaning of the "forgotten Ninth Amendment"?

(6) **Tenth Amendment:** Does it have any teeth in insuring federalism? What about "states' rights"?

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Senator Leahy

(1) **Freedom of Speech:** Basic doctrinal issues; RBG cases (Evans, CCNV). Does RBG regard this is a "first freedom"?

(2) **Free Exercise:** RBG views on Smith; Will RBG criticize Smith as Souter did? Does she still believe in Goldman, or is she now a subscriber to Smith?

(3) **Establishment Clause:** RBG's views on the Lemon test? Does she agree with the Jeffersonian "wall" metaphor? Unlike free exercise, there are no RBG cases on which to judge her, so Leahy wants to get some feel for where RBG is on this issue.

(4) **Tensions in D.C. Circuit:** Is the court polarized and divided? How did RBG get her reputation as a consensus-builder?

(5) **Abortion Rights:** RBG's views generally; her awareness of the special problems of women in rural areas.

(6) **Freedom of Information:** RBG's views on FOIA; Leahy is a strong FOIA booster and will press on any "anti-FOIA" decisions by RBG.

(7) **New Technology and Freedom:** Leahy may also ask some general questions about how the Constitution "grows" to deal with new issues raised by new technology (e.g., digital telephony).

(8) **Takings:** Wouldn't the New Right's agenda on the takings clause make environmental regulation impossible?

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Senator Specter

(1) **Scope of Questioning:** Specter is expected to open with the exchange of letters; to explore any criticisms RBG has of the Bork hearings; and to examine the general lines drawn in RBG's 1988 article on the confirmation process.

(2) **War Powers:** Is the War Powers Act constitutional? Was the Korean War a constitutional war? If not, should the Court have declared it as such? What is RBG's view of the allocation of powers in this area between the President and the Congress?

(3) **Free Speech:** May seek RBG's views on Brandenberg, or other speech cases. Will ask some questions seeking to ascertain her general approach to the doctrine.

(4) **Establishment Clause:** How RBG views the Lemon test? How to make sense of the subtle lines in the Court's jurisprudence?

(5) **Affirmative Action:** When are race-conscious remedies permissible? What did RBG mean in her concurrence in O'Donnell?

(6) **Jewish Seat:** How does RBG feel to be taking the "Jewish seat"? Does she see herself as having a special role or responsibility in this regard?

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Senator Heflin

(1) **Judicial Philosophy:** What is RBG's overall philosophy? Does she believe in judicial restraint? Is she really a moderate?

(2) **Abortion - Madison Lectures:** What are RBG's views generally on abortion? What is her view of Roe? What was she trying to say in the Madison Lectures?

(3) **Wright v. Regan:** What was the basis of RBG's opinion in this case? Why was she reversed by the Supreme Court? What are her views on standing generally?

(4) **Dronenberg:** What was the basis for RBG's separate opinion? Was she expressing a view on the underlying constitutional question? Why did she criticized Bork's opinion in the case, but later defend it in a speech?

(5) **Relations between Courts and Congress:** RBG's views on what Congress can do to improve relations? RBG's views on reform proposals, such as Federal Courts Study Commission (Heflin was a member)?

(6) **Statutory Interpretation:** RBG's approach; her application of Chevron deference; her use of legislative history?

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Senator Brown

(1) **"Utility Infielder":** Brown principally intends to be on the lookout for "liberal" statements by RBG on the first day, and press her on these on the second day, when he will question.

(2) **Judicial Style vs. Judicial Philosophy:** Brown intends to press the Jipping critique of RBG: i.e., that her reputation as a moderate is overblown; that she is moderate in style -- but liberal in philosophy; and that conservatives are being misled by her moderate style into believing that she is a judicial moderate.

(3) **Property Rights:** This will be Brown's major substantive area: Does RBG regard property rights as "fundamental rights," in the same way the "personal" rights (such as abortion) are fundamental? In general how does the protection Judge Ginsburg would accord to property rights compare to "personal" rights? What about a case like Moore, where the two are bound together? When is a regulation a taking?

(4) **Separation of Powers:** What are RBG's views on this? What does her decision in In re Sealed Case indicate about her views? Do her "liberal" opinions on standing indicate something about her separation of powers views?

(5) **RBG's Speech at 8th Circuit Conference:** RBG's views on "originalism"? What is her judicial philosophy, at a general level? What limits her "activism," if not fidelity to original intent?

(6) **Freedom of Speech/Obscenity:** What restrictions, if any, are permissible on speech in the field of obscene speech? RBG's views on the Pornography Victims Compensation Act?

(7) **ACLU Activities:** What was RBG's role in the organization? What is RBG's views of its more controversial policies?

(8) **Strict Scrutiny - Gender:** What distinctions between men and women would RBG uphold? What, if any, are legitimate? And how does this view square with use of strict scrutiny in race area?

(9) **Apply Laws to Congress:** May ask RBG about her comment about the applicability of general laws to Congress (e.g., Title VII); Brown is a critic of Congress' self-exemption.

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Senator Simon

(1) **Sensitivity:** Is RBG sensitive to the problems of those who have lived different lives from hers? Ever visited an Indian reservation? Does she care about "little people"?

(2) **Stare Decisis:** What is RBG's approach? When does she defer to precedent; when will she reject them?

(3) **RBG and Bork:** Why did she agree with him so often? What is her response to 1987 Legal Times analysis on rate of agreement?

(4) **Civil Rights:** Does RBG care about civil rights? What are her views about race relations?

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Senator Cohen

(1) **Independent Counsel:** RBG's dissent in In Re Sealed Case; Cohen is Senate sponsor of Independent Counsel law.

(2) **Goldman Case:** RBG's views on religious freedom in the military; views on Free Exercise generally.

(3) **Right to Privacy:** Where does RBG find it? What are its roots? What are its full implications?

(4) **Race Relations:** What is the role of law in promoting racial healing? RBG's views on the state of race relations in the U.S. today?

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Senator Kohl

(1) **Personal Questions:** Why does RBG want the job? What does she bring to it? Does she have a "big heart"?

(2) **Judicial Philosophy:** How does she define her philosophy? Does it have a "heart"? How does RBG describe herself? As a "centrist"? As a "pragmatist"?

(3) **First Amendment;** What does her decision in ACT say about her First Amendment views? What are her views about government regulation of the airwaves?

(4) **Cameras in the Courtroom:** Will RBG support cameras in the Supreme Court?

(5) **Separate Opinion Writing:** How did RBG come to her view on this? When is it appropriate -- and when isn't it?

(6) **Antitrust:** Kohl will probably ask about any major antitrust topics that are overlooked by Senator Metzenbaum.

(7) **Consensus Builder:** Is RBG a consensus builder? How does she do it as a quiet person? Response to Dershowitz's attacks on RBG?

(8) **Preparation:** What was the role of DoJ, the White House, and outsiders in her preparation? What conflicts of interest are created? What recusals will result? [Kohl may forego these questions this time.]

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Senator Pressler

A. First Round

(1) **Indian Jurisdiction:** Tribal jurisdiction over non-Indians; Duro; quality of tribal courts; when can Indians go into federal court? Criminal jurisdiction on Indian lands (can whites be tried in Indian courts)?

(2) **Non-Indian Rights:** Rights of non-Indians on Indian lands (e.g., hunting and fishing rights)? Rights of whites to be tried in non-Indian courts?

(3) **Water Rights:** How can RBG, as Easterner, understand West's complex water rights cases? (These were Justice White's specialty).

B. Second Round

(4) **Regulatory Takings:** When does mining regulation effectuate a taking? Is the rule complete deprivation of value, or something short of that?

(5) **Agricultural Antitrust:** What about the agricultural antitrust exemption?

(6) **Victims' Rights:** What is RBG's view on "victims rights"? What can be done to limit "criminals' rights"?

(7) **States' Rights:** What is the scope of state power to regulate abortion, under Planned Parenthood? What is RBG's view? What about under the Freedom of Choice Act?

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Senator Feinstein

(1) **Gay Rights:** Feinstein supports gay rights; may question Ginsburg on Dronenberg or general constitutional issue.

(2) **Death Penalty:** Feinstein supports death penalty; concerned about Ginsburg's opposition (or even neutrality) to it; other "ACLU-crime" questions.

(3) **Abortion Rights:** Feinstein supports abortion rights; concerned about Ginsburg's criticisms of Roe.

(4) **Criminal Procedure:** Feinstein will try to establish that RBG is a moderate; she is concerned about ACLU ties and wants Ginsburg to distance herself from that group.

(5) **Victims of Crime:** Does RBG understand their problems and needs? Does she "care" about them as much as she "cares" about defendants?

(6) **Immigration:** Feinstein is a hard-liner on immigration issues; she is formulating some questions on this topic.

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Senator Mosely-Braun

(1) **Civil Rights:** Is RBG committed? Review of discussion of Brown and Loving in Madison Lectures? Affirmative action and permissible use of set-asides? [Failure to hire black law clerks?]

(2) **Voting Rights Act:** How does RBG view the Act? Does she recognize its importance? How does she feel about Shaw?

(3) **Formal vs. Substantive Equality:** Which does RBG think is important, both in the context of gender and race? Is mere "formal" equality sufficient -- or should we strive for substantive equality as well? Which of these two is the goal of the Constitution and its Equal Protection Clause?

(4) **Gender Issues:** Mosely-Braun is interested in the New Republic piece, and may ask questions about the divisions between RBG and the "New Feminists"?

(5) **Free Speech:** RBG's views on "cutting edge" issues and cases; hate crimes and speech codes; other "new" issues in free speech jurisprudence.

(6) **Abortion Rights:** Wouldn't RBG's "gradualist" approach to Roe have hurt poor women? RBG's views on restrictions (e.g., waiting periods) that hurt rural and poor women.

(7) **Court as Leader:** What does RBG's criticism of the Court as being "too far ahead" of the country mean in the Madison Lecture?

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001a. report	re: Financial Disclosure Report (12 pages)	06/21/1993	P6/b(6)
001b. report	re: Financial Disclosure Report (1 page)	05/01/1993	P6/b(6)
002. list	re: Attendance List - Ruth Bader Ginsburg Taking of Oath at U.S. Supreme Court (1 page)	08/03/1993	P6/b(6)
003. list	re: Attendance List - Ruth Bader Ginsburg Taking of Oath at U.S. Supreme Court (partial) (2 pages)	08/03/1993	P6/b(6)
004. form	re: Senate Judiciary Committee - Initial Questionnaire (Supreme Court) - Biographical Information - Ruth Bader Ginsburg (partial) (3 pages)	ca., 06/1993	P6/b(6)
005. memo	Ron Klain to Howard Paster re: Questioning (4 pages)	07/21/1993	P5 Dup 6438
006. memo	Ron Klain to Howard Paster re: Questioning - Round Two (5 pages)	07/21/1993	P5 6438

COLLECTION:
Clinton Presidential Records
Counsel's Office
Victoria Radd
OA/Box Number: 6763

FOLDER TITLE:
[Ruth Bader Ginsburg Supreme Court Nomination] [3]

2006-1067-F
jp2227

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
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6438 Dup

July 21, 1993

MEMORANDUM FOR HOWARD PASTER

FROM: RON KLAIN

SUBJECT: LIKELY AREAS OF QUESTIONING -- SECOND ROUND

Here are the likely areas of Judiciary Committee questioning for the early second round, based on our most current intelligence.

Chairman Biden

(1) **Separation of Powers:** RBG's view on this. What does her dissent in In re Sealed Case say about her views on separation of powers?

(2) **Chevron:** What are RBG's views on Chevron deference to agencies? Doesn't excessive deferrence upset the balance in separation of powers, since it tends to favor the executive branch regulations over legislative history in interpreting a statute?

(3) **Free Exercise:** Smith and progeny; RBG views on Smith (akin to Souter); RBG's decision in Goldman.

(4) **Unenumerated Rights:** What are your views on Scalia's footnote six in Michael H? How do you decide which "liberties" are protected within the scope of the liberty component of the Due Process Clause of the Fourteenth Amendment?

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Senator Hatch

(1) **Judicial Activism vs. Restraint:** Is Ginsburg a moderate in substance, or just style? Is her reputation for restraint undeserved, as a product of her place on a court bound by precedent? Is she a closet activist?

(2) **Statutory Rape Comment:** Why did RBG seek to strike relevant sentence from ACLU policy? Does she believe statutory rape laws are per se unconstitutional?

(3) **Separation of Powers:** RBG's view on this; her dissent in In re Sealed Case? Does she believe that any limits exist -- and what are they? Are RBG's views on standing as "liberal" as they appear to be in Wright or Spann?

(4) **Religious Freedom:** Hatch is critical of Smith; will seek RBG's views. Hatch is also very pleased with RBG's view in Olsen that the government can ban marijuana under the compelling state interest test; will raise this to prove that the Religious Freedom Restoration Act is not inconsistent with anti-marijuana laws.

(5) **Vetters:** RBG's experience with outside vetters; confirmation helpers; conflicts of interest and recusals.

(6) **Affirmative Action:** Do "benign" classifications get strict scrutiny? Does RBG stand by her Bakke brief? What are the "other justifications" (beyond remedial) that RBG was referring to in O'Donnell to justify set asides?

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Senator Kennedy

(1) **Civil Rights:** RBG is clearly aware of gender discrimination; is she sensitive to other sorts of discrimination? Specific questions will be on the following cases:

(a) **Shaw**, the Attorneys Fees case;
(b) **Spann** and **Wright**.

(2) **Affirmative Action:** What are RBG's views on remedies and affirmative action? What are the alternative justifications for set asides that RBG was referring to in O'Donnell?

(3) **Free Exercise:** Kennedy will praise RBG's decision in Goldman, and ask her to comment on it. He will ask about the distinction between legislative prayer and school prayer.

(4) **Free Speech:** Kennedy will attempt to demonstrate that RBG's decisions in ACT and CCNV are squarely in the mainstream. Weren't you just doing your job when you protected the rights of people to state unpopular views?

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Senator Thurmond

(1) **Death Penalty:** Why won't RBG answer these questions when so many other nominees have done so? Can statistics alone be used to prove race discrimination in challenging the death penalty?

(2) **Gay Rights:** Bowers; gays in the military; equal protection for gays; affirmative action for gays.

(3) **ACLU Generally:** Attack on controversial ACLU policies and any RBG connections to them.

(4) **Tenth Amendment:** General support for states' rights; How does RBG interpret the Tenth Amendment?

(5) **Obscenity:** General doctrinal issues and the power of Congress to regulate indecent speech.

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Senator Metzenbaum

(1) **Abortion Rights:** Roe said that there was a fundamental right to an abortion -- Casey cut back on that. Is there still a fundamental right to choose?

(2) **Antitrust:** Can economic theory alone lead to a conclusion that there has been no antitrust violation? Is efficiency alone a justification for an antitrust violation?

(3) **Criminal Law:** How should federal courts deal with evidence of innocence in capital cases (cf. Herrerra)? Does the Constitution permit the execution of innocent people?

(4) **Sentencing Case:** How can RBG justify her recent vote in the en banc sentencing case that "penalized," under the guidelines, a defendant's decision to go to trial?

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. list	re: Notification Calls (partial) (1 page)	n.d.	P6/b(6)
002. notes	re: Handwritten Notes - RBG [Ruth Bader Ginsburg] (7 pages)	06/13/1993	P6/b(6)
003. memo	Joel Klein to Bernard Nussbaum re: Judge Ginsburg's View in Selected Areas (3 pages)	ca. 7/1993	P5 6439

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Victoria Radd
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FOLDER TITLE:
[Ruth Bader Ginsburg Supreme Court Nomination] [4]

2006-1067-F
jp2228

RESTRICTION CODES

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TO: Bernard Nussbaum
Counsel to the President

FROM: Joel Klein

RE: Judge Ginsburg's View in Selected Areas

I was asked to prepare a summary statement on Judge Ginsburg's views in the following three areas -- public funding for abortion; criminal law; and economic issues.

1. Public Funding for Abortions. As far as I am aware, Judge Ginsburg has not overtly and directly written that she favors public funding for abortions, as a policy or constitutional matter. There is, however, every reason to think that she does, on both grounds. Most notably, in her 1985 article on abortion rights, she pointedly expressed her concern about "the plight of the woman who lacks resources to finance privately implementation of her personal choice to terminate her pregnancy." And in the same article, where she proposed that abortion rights should be founded at least in part on the constitutional guarantee of women's equality, she emphasized that one consequence of an equality-based foundation was to bolster the argument for the unconstitutionality of public-funding prohibitions like the Hyde Amendment: "If the Court had acknowledged a woman's equality aspect, not simply a patient-physician autonomy constitutional dimension to the abortion issue, a majority perhaps might have seen the public assistance cases as instances in which, borrowing a phrase from Justice Stevens, the sovereign had violated its 'duty to govern impartially.'" These statements, though characteristically

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cautious and guarded, would hardly have been written by someone without pretty strong feelings about the injustice of denying poor women genuine access to abortion. The same attitude seems to be reflected in Judge Ginsburg's opinion striking down the Reagan-Bush "Mexico City Policy" (which banned aid to any family planning organization abroad that furnished abortion counseling or referral), although the case was decided on First Amendment grounds. DKT Memorial Fund Ltd. v. AID, 887 F.2d 275 (1989).

2. Criminal Law. Judge Ginsburg's approach to criminal law is characteristic of her case-by-case, non-ideological approach to decisionmaking generally. She has written many decisions over the years and cannot be categorized as pro-government or pro-defendant. Almost all of her decisions, in fact, are for a unanimous court. She has never written on the constitutionality of the death penalty, as far as I am aware, if only because, until recently, no such penalty was authorized in the District of Columbia. Judge Ginsburg's two most "high visibility" rulings in this area are her dissent arguing that the Independent Counsel statute was constitutional, a position vindicated by the Supreme Court, and her dissent from denial of rehearing in the Oliver North case, where she suggested that the panel majority reversing North's conviction wrongly narrowed the reach of certain criminal laws designed to protect government from abuse.

3. Economic Issues. The D.C. Circuit, in contrast to

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other circuits, gets the lion's share of agency cases involving economic regulation and relatively few antitrust cases. Judge Ginsburg has written numerous administrative law opinions. She is slightly more aggressive that the middle of the current Supreme Court in terms of her willingness to overturn an agency decision, an approach reflected, for example, in cases where federal agencies deny workers or miners an opportunity to air grievances. Moreover, Judge Ginsburg tends to defer to the agency based on deeply held views about proper institutional roles -- that the agency has overall regulatory responsibility and that courts should be careful not to impose their views about sound economic policy when Congress has assigned that task to an agency. Judge Ginsburg's economic opinions are pragmatic, fact-specific, non-ideological. Her opinions neither favor nor disfavor regulation (versus the free market). Instead, she leaves those questions to Congress and decides only whether the agency has rationally and fairly applied the regulatory guidelines in the statute.

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Joel Klein to Bernard Nussbaum re: Judge Ginsburg's Opinions and Legal Scholarship (17 pages)	06/11/1993	P5 6440
002. memo	Joel Klein to Bernard Nussbaum re: Judge Ginsburg's View in Selected Areas (3 pages)	ca. 07/1993	P5 6439 Dup

COLLECTION:
Clinton Presidential Records
Scheduling Office
Ricki Seidman
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FOLDER TITLE:
Ruth Bader Ginsburg [2]

2006-1067-F
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6440

MEMORANDUM

TO: Bernard Nussbaum,
Counsel to the President

FROM: Joel Klein

DATE: June 11, 1993

RE: Judge Ginsburg's Opinions and Legal Scholarship

Based on research prepared by approximately 40 lawyers at six firms, who read Judge Ginsburg's opinions between Wednesday night and Thursday night, one of my partners and I have attempted to prepare something of a comparative analysis of Judges Ginsburg and Breyer. We set out our conclusions in section 1. In section 2 we discuss specific areas of the law and opinions of note.

1. While there are many similarities between these two jurists, there are some significant distinctions that I would like to focus on first. Judge Ginsburg has a few "positives" that are potentially important. She has written more, and consistently, about the human condition and the plight of the disadvantaged, and she has done so with obvious conviction and commitment. She has written or joined strong strong opinions -- in substance and in style -- in cases involving (a) African-American school children suing the IRS to enforce an antidiscrimination policy against private schools, (b) reparations to Japanese Americans who were placed in internment camps during World War II, (c) a soldier's right to wear a yarmulke, and (d) the First Amendment protection to be accorded "abortion counseling."

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Thus, while Judge Ginsburg, like Judge Breyer, is noted for her administrative law opinions, they do differ if one looks for a sustained interest in social issues. This difference is most visible when one looks at the different areas addressed in their nonjudicial writings: Judge Breyer writes on economic regulation and administrative law, whereas Judge Ginsburg writes primarily on women's rights, with a few articles in procedural areas and political areas (like the process of amending the Constitution or judicial confirmation proceedings). As to her views on social issues, moreover, Judge Ginsburg is best seen as a liberal-leaning moderate, whereas Judge Breyer is a down-the-middle moderate.

In economic areas, on the other hand, Judge Ginsburg is moderate (or perhaps slightly conservative), while Judge Breyer is clearly conservative. Unlike Judge Breyer, moreover, Judge Ginsburg does not have a solid body of landmark antitrust decisions or economic regulation writings (such as Judge Breyer's 1992 Holmes Lectures) that will provoke controversy. She has twice joined antitrust opinions by Judge Bork that are conservative, but her opinions and other cases that she has joined in this area are generally more pragmatic and much less easy to pigeonhole.

In terms of potential "negatives," I would say that Judge Ginsburg's work does not have quite the obvious brilliance that Judge Breyer's does and her opinions tend to be less pedagogical and, in that sense, somewhat less remarkable. Nevertheless, hers is plainly a first-rate legal mind and her opinions are extremely

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well-written, measured, and fair. To put the matter simplistically, I would suppose that, in terms of craft, Judge Breyer would be on everyone's list of the five most qualified judges on the federal courts of appeals, while Judge Ginsburg would be on most people's list of the five best and almost everyone's list of the ten best.

In terms of potentially controversial issues, there are two matters concerning Judge Ginsburg that merit mention. The first is her writings about Roe v. Wade. Much that has been bandied about on this topic is misleading. The basic facts, as I understand them, are that Judge Ginsburg, in her writings (though not in any judicial opinion), has questioned the breadth of the decision in Roe as a matter of sound judicial politics -- suggesting that, while she believes the Texas abortion statute there at issue was unconstitutional, the Court's opinion was so far-reaching that it shut down all political debate and galvanized the radical right. She believes that a dialectic between the Court and state legislatures -- rather than a moral lecture by the one to the other -- would have been more effective in the long term, precisely because women (in contrast to African Americans, for example) potentially can exercise political muscle.

Judge Ginsburg has also said that Roe should have relied on the equal protection clause (though not necessarily only that clause) in striking down the abortion statute. She argues that abortion restrictions are properly categorized as discriminating against women and that striking them on that basis fits well

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within traditional Fourteenth Amendment analysis. One effect of her analytic approach, she argues, is that funding restrictions under public programs would also be unconstitutional.

A somewhat related potential concern is Judge Ginsburg's opinion in Dronenburg v. Zech, 746 F.2d 1519 (1984), where she voted to deny rehearing by the full D.C. Circuit of a panel decision written by Judge Bork rejecting a constitutional challenge to a Navy discharge for private homosexual conduct. Judge Bork had broadly criticized the Supreme Court's jurisprudence on privacy. Judge Ginsburg said two things: (1) rehearing was not appropriate because the Supreme Court's decision in Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976), required the result reached in the decision; and (2) the broad language in Judge Bork's opinion had no precedential value but reflected only "the opinion writer's viewpoint, a personal statement that does not carry or purport to carry the approbation of the court." (In another case, by the way, Judge Ginsburg joined a panel decision authorizing a judicial challenge to a CIA decision terminating an employee because he was a homosexual. Doe v. Casey, 796 F.2d 1508 (1986), rev'd in part, aff'd in part, 486 U.S. 592 (1988).)

Overall, I would think that Judge Ginsburg more closely meets the President's articulated standards for the Supreme Court than does Judge Breyer. Both stand out in excellence, consensus building on their respective courts, respect among colleagues, academic distinction, moderation in style and, by and large, moderation in substance. I would think that, on the basis of

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their work, both would be easily confirmable. Nevertheless, Judge Ginsburg's work has more of the humanity that the President highly values and fewer of the negative aspects that will cause concern among some constituencies.

I recognize that Judge Ginsburg herself is not a powerful presence (except on the bench, where her style is polite but insistent), but her opinions and articles are. Before coming on the bench, she had a distinguished career as a women's rights advocate, having argued and won most of the early landmark Supreme Court cases in the area. That experience and commitment are still reflected in her work, even as she has made the transition from a partisan advocate to a neutral judge with a keen awareness that the rule of law and principled, unbiased decisionmaking are the surest long-term guarantee of liberty. In my opinion, she is likely to be a strong leader for the moderate bloc on the Supreme Court, moving them toward a more solidly progressive view on human rights issue. She has the intellectual horsepower, the discipline, and the personal style to do this. Based on my knowledge, she does not let ego and personal matters get in the way of smooth collegial relationships, a matter about which she has written. The only real reason to disagree is substance, as to which, her opinions show, she believes disagreement, so long as principled and handled in a professional fashion, an affirmative good.

2. A. <u>Abortion Rights</u>

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Judge Ginsburg has written articles discussing Roe v. Wade. Doubtless reflecting the fact that she is a sitting judge who could face related issues, each time she has been avowedly (and obviously) guarded -- she has addressed the subject "tentatively and with trepidation," offering "reflections and concerns" short of full-scale attempts to offer judgments about the range of issues raised by the decision. Essay: Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade, 63 N.C.L.Rev. 375 (1985). Because the voicing of any concerns about Roe is viewed by some as cause for alarm, these pieces will be much discussed and worried about. It is important to state clearly, therefore, that Judge Ginsburg has not suggested that Roe should be abandoned.

What she has done is essentially two-fold, both parts seeking by their terms to establish abortion rights more firmly than Roe has done. First, she has worried that as a historical matter the sweeping character of the ruling, and the "code"-like character of its trimester scheme, may have forestalled a process of societal acceptance that seemed under way in the state legislatures in 1973 and, instead, may have helped provoke the anti-abortion movement that grew up after Roe. She has compared this process to the more successful process of societal acceptance of women's rights during the same decade, when the Supreme Court took a more incremental approach to the development of equal rights. The incrementalism to which Judge Ginsburg is attracted has worried some proponents of strong abortion rights. Second, and related to the comparison to sex discrimination, she

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has suggested that abortion rights should not have been adopted without any connection to the equality rights of women. One major advantage to this approach, she has said, is that a constitutional right to public funding for abortions -- rejected by the Supreme Court because of its exclusively privacy-based view of abortion rights -- is much easier to support. Nevertheless, although she has not said that privacy should be thrown out as a basis for abortion rights, there has been concern that a focus on equality would end up edging out the privacy basis.

As far as case law is concerned, she spoke of certain abortion-related rights in only one case, in the First Amendment context of DKT Memorial Fund, discussed below.

B. Free Speech

In CCNV v. Watt, 703 F.2d 586 (1983), she concurred in the court's holding (later reversed by the Supreme Court) that the Park Service had not adequately justified its ban on CCNV's sleeping in Lafayette Park as a protest against homelessness. Her opinion is a classic example of her independence of mind and moderation. She rejects then-Judge Scalia's anti-CCNV view by eloquently explaining the need to give the First Amendment a broad reading to accommodate non-traditional modes of expression. At the same time, she hesitates to treat sleeping in the park as the full equivalent of verbal speech because of government's legitimate interests in reasonably regulating the non-speech aspects of sleeping in the park.

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In Abourezk v. Reagan, 785 F.2d 1043 (1986), Judge Ginsburg reversed a district court's rejection of challenges to visa denials to several foreign persons for political reasons. With clear First Amendment concerns in mind, she remanded for further inquiry into the reasons for the visa denials.

In DKT Memorial Fund Ltd. v. AID, 887 F.2d 275 (1989), Judge Ginsburg, in dissent, spoke strongly in support of freedom of speech, arguing that abortion-related restrictions on AID grants to family-planning groups abroad violated the First Amendment:

> AID has unconstitutionally deployed its puissant purse to restrain the privately-funded speech and association of domestic . . . organizations engaged in family planning work overseas. [887 F.2d at 299.]

Citing the established Supreme Court precedent on the constitutionality of denying public funds for abortions, while signaling by her language her disdain for the idea, she explained:

> The situation stateside is not in dispute. On the one hand, government need not spend public funds on abortion services; it may, instead, encourage the indigent pregnant woman to reproduce by paying the full medical costs of childbirth, Harris v. McRae, as well as child support thereafter. On the other hand, government may not deter private action; it may not deny public funding available for non-abortion related family planning to otherwise qualified domestic organizations that use their privately-raised funds for lawful abortion-related services. Government may demand only that public funds be segregated by the grantee so that they are used solely for the specified family planning services, and not for abortion-related activity.

Id. at 299-300. She explained that "[a] condition thus designed to entice away [the organization's] audience and allies is unconstitutional." Id. at 301. "Abortion counseling compatible

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with governing law is sheltered speech, just as anti-abortion counseling is." Id. at 303.

In Action for Children's Television v. FCC, 852 F.2d 1332 (1988), she vacated an FCC indecency ruling on administrative law grounds heavily influenced by the First Amendment concerns.

Freedom of Religion

In Goldman v. Sec'y of Defense, 739 F.2d 657 (1984), later affirmed by the Supreme Court (475 U.S. 503 (1986)), Judge Ginsburg wrote a dissent from a denial of en banc review, in which she defended the First Amendment rights of a military officer to wear a yarmulke while on duty: "The plaintiff in this case . . . has long served his country . . . with honor and devotion. A military commander has now declared intolerable the yarmulke Dr. Goldman has worn without incident throughout his several years of military service. At the least, the declaration suggests 'callous indifference' to Dr. Goldman's religious faith, and it runs counter to 'the best of our traditions' to 'accommodate[] the public service to the[] spiritual needs [of our people].'" Id. at 660. This is just the sort of passionate expression of personal views that gives a good indication of how Judge Ginsburg might approach an issue if on the Supreme Court.

C. Civil Rights

Judge Ginsburg's opinions in this area are in accord with what is revealed repeatedly, quietly, and in a scholarly manner in her many non-judicial writings on the subject -- her deep commitment to rooting out discrimination. The speeches and

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articles she has given on this subject are too numerous to mention, stretching back to 1970 and beyond, when she was the principal litigator asking the Supreme Court to attack sex discrimination, as well as a prominent promoter of the Equal Rights Amendment as "the way for a society that believes in the essential human dignity and interdependence of each man and each woman." Let's Have E.R.A. as a Signal, 63 A.B.A.J. 73 (Jan. 1977). She continues to appear in public and in print as an advocate, celebrant, and example of how far the courts, legislatures, and social attitudes have come in rejecting the oppressive history of "enshrining and promoting the woman's 'natural' role as homemaker, and correspondingly emphasizing the man's role as provider, [which] impeded both men and women from pursuit of the very opportunities that would have enable them to break away from familiar stereotypes." Remarks on Women Becoming Part of the Constitution, 6 Law and Inequality 17, 21 (1988).

Because she is a sitting judge, she is clearly cautious about how far she can or should go in discussing live public issue off the bench. Nevertheless, she long ago publicly opposed the use by businesses of all-male clubs. American University Commencement Address, May 10, 1981, 30 Amer. U.L. Rev. 891, 898 (1981). And, as noted above, she has on several occasions, in 1985 and last year, broached the idea of connecting constitutional abortion rights to the guarantee of women's equality. Plainly, this is still one of her passions and commitments.

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Judge Ginsburg's work as a judge in civil rights cases shows no difference in commitment to the importance of equality -- and not just gender equality -- but most of the cases raise narrower legal issues under statutes, precedents, or other authorities. As in other areas of law, she has determinedly sought to interpret and apply governing law wherever it leads, but she often finds a way to reemphasize the fundamental policies at issue. For example, in Loe v. Heckler, 768 F.2d 409 (1985), she sternly criticized the Government for an argument that "would improperly impede the goal of making federal employment free from proscribed discrimination" and that she said was "made of tripwire; it has appropriated doctrines designed to ensure fair opportunity for voluntary compliance of informal settlement and deployed them to check, not forward, Title VII enforcement."

On affirmative action, she has made clear that, consistent with governing precedent, she believes that carefully designed programs are proper notwithstanding the burdens they might impose on innocent majority group members. In O'Donnell Constr. Co. v. District of Columbia, 963 F.2d 420 (1992), she concurred in the invalidation of D.C.'s minority contracting program as compelled by the Supreme Court's Croson decision but wrote separately to clarify that such a program could be valid if more narrowly drawn and better supported by facts. Similarly, in Landner v. Lujan, 888 F.2d 153 (1989), she wrote a concurrence upholding a remedy for discrimination that would "bump" certain innocent employees; she noted the burdens thereby imposed and argued for care in use of such a remedy.

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On the rights of the disabled, Judge Ginsburg wrote a dissent that would have treated alcoholism as a handicap covered by the anti-discrimination bar. McKelvoy v. Turner, 792 F.2d 194 (1986). (The Supreme Court disagreed. 485 U.S. 535 (1988).) And in Lunceford v. District of Columbia Board of Education, 745 F.2d 1577 (1984), she sided against a handicapped child in a case under the Education for All Handicapped Children Act based on her careful reading of the statutory language and policies.

Two other decisions are telling about Judge Ginsburg's approach to civil rights. First, in Hohri v. United States, 793 F.2d 304 (1986), she joined an opinion adopting an extraordinarily liberal approach to the statute of limitations for the acknowledged purpose of allowing Japanese-Americans removed to internment camps during World War II to sue for this "extraordinary episode of injustice." Second, in Inmates of Occoquan v. Barry, 850 F.2d 796 (1988), Judge Ginsburg wrote an opinion (a dissent from denial of en banc review) expressing a robust view of district court power to enforce Eighth Amendment guarantees regarding prison conditions.

D. Access to Court

Judge Ginsburg's view on "standing" and other issues governing the right to bring suit in federal court seems generally to be a pragmatic and prudential one. On one hand, she seems to favor broad access as a constitutional matter. On the other, she has bowed to substantially constraining Supreme Court precedent. Moreover, she has used some of these doctrines,

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particularly ripeness, in a pragmatic way to postpone adjudication of difficult or delicate legal issues.

Most notable as a standing opinion is Wright v. Regan, 656 F.2d 820 (1983), where she held (in a decision later reversed by the Supreme Court) that the parents of black schoolchildren nationwide had standing to sue the IRS for inadequate enforcement of its obligation to deny tax exemptions to racially discriminatory private schools. The opinion, a careful parsing of two conflicting lines of Supreme Court precedent, follows the pro-standing line -- "until the Supreme Court instructs us otherwise" -- because of "the centrality of [the right of black citizens to insist that their government 'steer clear' of aiding schools in their communities that practice race discrimination] in our contemporary (post-Civil War) constitutional order." Id. at 832.

In Spann v. Colonial Village, 899 F.2d 24 (1990), she wrote an important decision, carefully crafted to avoid conflict with the Supreme Court's narrow standing decisions, upholding the right to sue of fair housing groups challenging discriminatory advertising practices of apartment complexes. And in Center for Nuclear Responsibility v. NRC, 781 F.2d 935 (1986), she dissented from a holding that the appeal was out of time, explaining that she would take a less rigid and mechanical view of the issue so as not to throw the litigants out of court. Similarly, she took a liberal view of standing in Dellums v. NRC, 863 F.2d 968 (1988), while rejecting standing on the facts in Shipbuliders Council v. U.S., 868 F.2d 452 (1989). She also found standing to

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bring an environmental challenge in NRDC v. Hodel, 865 F.2d 288 (1988).

In Sanchez-Espinoza v. Reagan, 770 F.2d 202 (1985), she declined to join a portion of an opinion dismissing as presenting a political question the claim that aid to the Contras violated Congress's war powers, although she found the claim unripe. In Copper & Brass Fabricators Council v. Dep't of Treasury, 679 F.2d 951 (1982), she made a plea to the Supreme Court to clarify, and liberalize, restrictions on standing to challenge agency action.

In Women's Equity Action League v. Cavazos,879 F.2d 880 (1989), Judge Ginsburg found constitutional standing to challenge HHS's general enforcement of Title VI's bar on discrimination by schools receiving federal funds. The next year, however, in Women's Equity Action League v. Cavazos, 906 F.2d 742 (1990), she found no congressional authority to allow a suit against the federal government seeking general oversight of its enforcement of Title VI's bar on discrimination in schools receiving federal funds. The opinion concludes that binding precedent -- speaking to the proper relation between the executive, legislative, and judicial branches -- foreclosed any right to bring such a suit in the absence of congressional authorization. For essentially the same reasons, in Coker v. Sullivan, 902 F.2d 84 (1990), she found no private cause of action to enjoin HHS to force state and local governments to comply with federal programs for the homeless.

In AFGE v. O'Connor, 747 F.2d 748 (1984), she held unripe a challenge by a government union to MSPB Special Counsel's purely advisory opinion that voter registration drives were

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illegal. Judge Mikva dissented. Although the employees' union lost, the decision, joined by Judge Edwards, follows a traditional ripeness analysis and displays no hostility to the union's claims or right to review at an appropriate time.

E. Criminal Law

Judge Ginsburg seems a moderate in this area as in many others. She has reversed even serious convictions where important fair-trial rights were denied, e.g., United States v. Eccleston, 961 F.2d 955 (1992); United States v. Foster, 982 F.2d 551 (1993); United States v. Wately, 987 F.2d 841 (1993), and has voted to allow downward departures from the Sentencing Guidelines, United States v. Harrington, 947 F.2d 956 (1991).

F. Separation of Powers

Judge Ginsburg held in Schor v. CFTC, 740 F.2d 1262 (1984), that only an Article III court, not a federal agency, could adjudicate state-law counterclaims. That decision, well-founded in then-prevailing precedent, was reversed by the Supreme Court, although Justice Brennan agreed with Judge Ginsburg's view. On the other hand, in In re Sealed Case, 838 F.2d 476 (1988), she dissented from the invalidation of the independent counsel statute -- and was vindicated when the Supreme Court upheld the statute.

G. FOIA

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Judge Ginsburg has taken a strong pro-disclosure position in a number of cases. In Campbell v. HHS, 683 F.2d 256 (1982), she laid down strict standards for invocation of the "investigatory records" exemption. In Schlefer v. U.S., 702 F.2d 233 (1983), she rejected an invocation of the deliberative-documents exemption for authoritative legal opinions. In Londrigan v. FBI, 722 F.2d 840 (1983), she set forth more limited standards for the government to claim informant confidentiality than the government urged; the standards she proposed are close to those adopted just this Term by the Supreme Court, which likewise rejected the government submission.

H. Environmental Law

Judge Ginsburg wrote an early decision, NRDC v. Gorsuch, 685 F.2d 718 (1982), rejecting the Reagan Administration's relaxation of clean air regulations through use of the "bubble concept." Two years later the Supreme Court reversed that decision. In Public Citizen v. NHTSA, 848 F.2d 256 (1988), she deferred to NHTSA on whether statutory fuel-efficiency standards were economically impractical and thus upheld laxer regulatory standards.

I. Labor law

In virtually all cases, Judge Ginsburg strongly defers to the NLRB in labor cases. There is one controversial, anti-union exception: Conair Corp. v. NLRB, 721 F.2d 1355 (1983), where she held that, even though gross unfair labor practices by the

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employer had permeated a union election campaign, the NLRB could not issue an order to bargain with the particular union absent "tangible evidence that the union ever secured the support of a majority of affected employees." Id. at 1377. Judge Wald vigorously dissented.

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Marsha Bishop to Judge Breyer & David Ellen; re: Mortgages (1 page)	05/24/1994	P6/b(6)
002. memo	Arthur Jones to Cliff Sloan et al; re: Stephen G. Breyer/Mortgages (1 page)	06/01/1994	P6/b(6)
003. memo	Draft from Joel Klein to Bernard Nussbaum (11 pages)	06/10/1993	P5 6443

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FOLDER TITLE:
Stephen Breyer - 1994 Memoranda [Binder] [1]

2006-1067-F
jp2267

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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DRAFT

MEMORANDUM

TO: Bernard Nussbaum,
Counsel to the President

FROM: Joel Klein

DATE: June 10, 1993

RE: Judge Breyer's Opinions and Legal Scholarship

Based on our research, conducted by approximately 25 lawyers at five separate firms, we are forwarding the following report to you. Section 1 will reflect some broad conclusions about the judge, his opinions and writings, and his judicial philosophy and interests. Section 2 will then discuss the judge's views in specific areas of the law, such as civil rights, antitrust, etc.

1. Judge Breyer is a brilliant jurist. His opinions are exceptionally clear, well-organized, and logically compelling. They are also fair and unusually balanced, in that Judge Breyer candidly acknowledges opposing arguments and explains why he ultimately disagrees, at times admitting that the question is a close one. Relatedly, his writing is dispassionate. He does not use rhetorical overstatement and never engages in ad hominem attack. At the same time, he does not wear his heart on his sleeve: his opinions almost never speak in a personal voice to state his feelings, convictions, or values. He writes consistently intellectual, analytical opinions. Some of his opinions, especially in the fields of antitrust and economic regulation, truly stand out for bringing clarity to a broad area

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of the law. Overall, I would say that there are few jurists today whose corpus of opinions is as professionally distinguished, and I believe that Judge Breyer has the potential to rank with the most distinguished judges in our past.

For an overall assessment of his placement on the "liberal-to-conservative" spectrum, as those terms are generally used, I would say that, in most social areas of the law (often, individual-versus-government cases), Judge Breyer is a moderate. He is careful in applying law to facts and does not typically embrace broad, far-reaching legal principles; his opinions are thus neither "pro-individual" nor "pro-government." In areas of economic regulation, on the other hand, Judge Breyer is generally conservative; he is skeptical of government's, and particularly the courts', capacity to regulate markets, and he has concentrated considerable attention on the dangers of overregulation. More frequently in this area than in the social area, he paints with a broad brush.

With respect to what are traditionally thought to be the three general areas of Supreme Court jurisprudence -- constitutional law, statutory construction, and agency review -- Judge Breyer's methodology is well-developed and easy to discern only in the latter two areas. Specifically, his approach to statutory construction is broad-based, relying heavily on the language of the statute, but using, where helpful, legislative history and other traditional interpretative aides. He has recently written an article on this issue, responding to Justice Scalia's argument that legislative history should be ignored in

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statutory interpretation. On the Uses of Legislative History in Interpreting Statutes, 65 So. Cal. L. Rev. 845 (1992). Judge Breyer's views place him well in the mainstream of the current Court's approach on this issue.

In the area of agency review, Judge Breyer also has a well-thought-through doctrinal approach. He strongly favors deferential, but real, review. In other words, his opinions respect the agency's discretion in exercising its responsibilities, but they also do the hard work of determining whether a decision is, in fact, reasonable (though not necessarily the result Judge Breyer himself would have reached), paying careful attention to the administrative record. This approach contrasts with many judges who reflexively tend to uphold agency decisions and many others who tend to substitute their own preferred solution for that of the agency. In my view, this approach would place Breyer in the more aggressive wing of the current Court in terms of administrative review. In a significant number of cases (approximately 35-40%), he overturns agency decisions.

Judge Breyer's views on constitutional law and civil rights are substantially less developed. These have simply not been a subject of his non-judicial writings, and his opinions tend to be reasonably straightforward applications of settled precedent. In the area of privacy, he has written nothing that sets out a doctrinal view. In his one abortion opinion (a dissent), he rejected a federal court challenge to the adequacy of the judicial bypass procedures provided under Massachusetts'

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parental-consent law, concluding that the Supreme Court had previously upheld the statute and that challenges to the state courts' administration of it should be raised in state, not federal, court. And in the area of criminal procedure, Judge Breyer applies existing Supreme Court precedent with, if anything, a somewhat conservative (pro-government) view. He has never opined on any death penalty issue.

For what it is worth, my guess is that Judge Breyer's views in constitutional law are less than fully developed largely because of his long-standing interest, teaching, and writing in the fields of economic regulation, antitrust, and administrative law. In those areas, his opinions reflect a confidence and a breadth of knowledge that make them special. He has been a real leader in those fields and I would suppose that his colleagues on the First Circuit have frequently deferred to him. In constitutional cases, on the other hand, I would surmise that he is just as happy to have others write the opinion when he is in the majority.

2.a. Antitrust and Economic Regulation. This is the area of law where Judge Breyer's views are most thoroughly developed and, I would suspect, likely to be most controversial. He is a major player in this arena, and other scholars write about him and his work. See, e.g., Latin, Legal and Economic Considerations In the Decisions of Judge Breyer, 50 Law & Contemp. Prob. 57 (1987).

Judge Breyer largely follows what is called the "Chicago-school" approach to economic regulation. He believes in market

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efficiency and is generally skeptical of judicial (and even executive) efforts to improve the market, because such efforts, in his view, frequently have unintended and unknowable consequences. He does not think that "small is beautiful": he is skeptical of attempts to use the antitrust laws to break up large operations that seem efficient in favor of smaller competitors that may be less efficient. Some of his opinions in this field are truly textbook examples of this kind of economic antitrust analysis. See, e.g., Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227 (1983) (predatory pricing); Grappon Inc. v. Subaru of New England, Inc., 858 F.2d 792 (1988) (tying arrangements); Town of Concord, Mass v. Boston Edison Co., 915 F.2d 17 (1990) (monopoly price squeeze in regulated industry). These are clear, comprehensive, and powerful analytic pieces.

Judge Breyer's views in this area are, in today's terms, conservative. In 20 cases he has ruled for the defendant all 20 times, often affirming, but not infrequently reversing, the trial court. A recent law review article concludes, using the author's criteria of "liberal" and "conservative," that Judge Breyer has a "more conservative voting record[]" in antitrust cases than Judge Posner, the "Dean" of the Chicago school. Kovacic, Reagan's Judicial Appointees and Antitrust in the 1990s, 60 Fordham L. Rev. 49, 89 (1991). The same article also remarks that "no federal judge writes more thoughtfully and elegantly about antitrust issues than Judge Breyer." Id. at 95.

Much as in antitrust, Judge Breyer's views about governmental risk regulation (with respect to the environment or

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the workplace, for example) are also generally viewed as conservative. In one well-known case, he rejected the EPA's effort to enforce higher standards in a clean-up operation subject to the "superfund" statute. United States v. Ottati & Goss, Inc., 900 F.2d 429 (1990). His analysis reflects the view that regulatory enforcement has to be more hard-nosed about balancing incremental cost against incremental benefit.

This view recently has been elaborated in Judge Breyer's "Holmes Lectures," delivered last year at Harvard Law School and soon to be published by Harvard University Press. This is an important piece and is bound to get considerable attention. Indeed, it was recently favorably reviewed by a strong conservative, Michael Bennett, in The Washington Times (6/8/93). (I am attaching our reviewers' two-page summary of Breyer's lectures along with the Washington Times column discussing them.) In a nutshell, Judge Breyer argues against overregulation ("tunnel vision") and proposes a new regulatory unit (as part of the Office of Information and Regulatory Affairs at OMB) that would be staffed by experts who would impose a government-wide cost/benefit approach to risk regulation. (A similar proposal has apparently been offered by several Republicans as a rider to the Administration's bill elevating EPA to cabinet level. This kind of proposal may bring to mind some of the ideas associated with the "Competitiveness Council" of the prior Administration.)

There is one other (less recent) article on regulatory matters that merits mention. In Vermont Yankee and the Court's Role in the Nuclear Energy Controversy, 91 Harv. L. Rev. 1833

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(1978), Breyer strongly argues for the development and use of nuclear energy, and it criticizes the Supreme Court's decision requiring the NRC to pay greater attention to a proposed nuclear facility's capacity to deal effectively with waste. The theme of the article is that "the licensing of nuclear power plants is no more likely to injure health or the environment than failure to license them." Id. at 1834.

b. First Amendment. With respect to free speech, Judge Breyer has written one very strong pro-First Amendment opinion. In Ozonoff v. Beznak, 744 F.2d 224 (1984), he invalidated a 1953 loyalty oath applicable to U.S. citizens who work at the World Health Organization. Judge Breyer also wrote an important opinion for his court in Wald v. Regan, 708 F.2d 794 (1983), striking down a Treasury Department regulation restricting the rights of U.S. citizens to travel to Cuba: he held that the regulation violated a federal statute, but his interpretation was strongly influenced by First Amendment concerns. This decision was reversed by the Supreme Court in a 5-4 vote, with Justice Blackmun writing a strong dissent (joined by Justices Brennan, Marshall, and Powell). In addition, Judge Breyer has written a lot of opinions on "political patronage," growing out of a change in government in Puerto Rico (over which the First Circuit has jurisdiction). He has generally been quite flexible (probably somewhat more so than the Supreme Court) in allowing a new government to discharge "political" employees. See Agosto-Felician v. Aponte-Roque, 889 F.2d 1209 (1989); Figueroa-Rodriguez v. Lopez-Rivera, 878 F.2d 1478 (1989) (en banc).

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With respect to freedom of religion, Judge Breyer appears to be something of a centrist: he has taken a somewhat more practical, less doctrinally clean view of church-state relations than many judges on either side of this issue. This probably can be seen best in Members of Jamestown School Comm. v. Schmidt, 699 F.2d 1 (1983), where the court upheld public funding for transportation to private, including religious, schools; but while the liberal majority reached that result reluctantly (based on Supreme Court precedent), Judge Breyer was not at all grudging in his concurrence upholding this policy. See also New Life Baptist Church Academy v. E. Longmeadow, Mass., 885 F.2d 940 (1989) (rejecting religious school's objection to the requirement of government approval; relies on importance of state interest in ensuring competent secular component of education).

c. Privacy. Judge Breyer has written only one opinion in this area, the parental-consent case noted above. Planned Parenthood League of Massachusetts v. Bellotti, 868 F.2d 459 (1989). He dissented from a ruling that allowed plaintiffs in federal court to try to show that the judicial bypass procedure in Massachusetts was in fact burdensome and difficult -- thus deterring young women from getting an abortion -- and simultaneously pointless (because in the end, the state courts almost invariably ruled for the woman). Judge Breyer concluded that, even if the plaintiffs could prove these facts, the statute would be constitutional in view of an earlier Supreme Court decision upholding the statute against a facial challenge. In substance, Judge Breyer took the position that the federal courts

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should not be reviewing the operation of state court proceedings in practice and that problems of that sort should be addressed by the state courts themselves.

It is also worth noting here that, while we did not generally analyze cases in which Judge Breyer simply joined another judge's opinion, we did look at Massachusetts v. Sullivan, 899 F.2d 53 (1990), which struck down the "gag" rule applied to family planning programs receiving federal funds. The Supreme Court subsequently took a different view of this issue in Rust v. Sullivan.

d. Civil Rights. Judge Breyer's opinions in this area are relatively straightforward applications of Supreme Court precedent. He has upheld two affirmative-action consent decrees against challenges by white government employees. Stuart v. Roche, 951 F.2d 446 (1991); Massachusetts Ass'n of Afro-American Police, Inc. v. Boston Police Dep't, 780 F.2d 5 (1985). In a similar vein, Judge Breyer took a generally broad enforcement approach with respect to a consent decree involving female employees at Brown University. Lamphere v. Brown University, 798 F.2d 532 (1986).

There is one case in the area of handicapped rights that is likely to be controversial. In Wynne v. Tufts University School of Medicine, 932 F.2d 19 (1991) (en banc), Judge Breyer dissented from a holding that Tufts Medical School had to explore more options at accommodation before it could expel a dyslexic medical student who performed poorly on multiple-choice exams. Judge Breyer would have upheld the school decision to expel,

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largely on the ground that the student's "particular disability, a psychological learning disadvantage, is closely related to the kind of characteristic, namely an inability to learn to become a good doctor, to which Tufts reasonably, and lawfully, need not 'accommodate.'" Id. at 30-31.

e. Criminal Law. Judge Breyer's opinions in this area are very much in the mainstream of the Supreme Court's current criminal law jurisprudence, which itself is quite conservative. He rarely finds a fourth amendment violation and, indeed, has dissented in two "sensitive" cases where the majority did so find. United States v. Guarino, 729 F.2d 864 (1984) (general warrant for obscenity search); United States v. Bergman, 717 F.2d 651 (1983) (airport search based on DEA profile). His opinions concerning the Sentencing Guidelines, which he was involved in drafting, are generally uneventful (even though the Guidelines themselves are quite controversial), typically, though not always, uphold the trial judge. He accords substantial latitude to prison officials. See Aruder v. Fair, 710 F.2d 886 (1983) (prisoners may be strip-searched both before and after leaving cell). He has not, however, turned a blind eye to some truly appalling prison conditions. Morales-Feliciano v. Parole Board of Puerto Rico, 887 F.2d 1 (1989); Cortes-Quinones v. Jimenez-Nettleship, 842 F.2d 556 (1988).

f. Miscellaneous Civil. Judge Breyer has written opinions in numerous other areas -- such as labor law, immigration law, environmental law, tort law, social security law, securities laws, etc. These opinions, while well-reasoned

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and well-written, do not otherwise stand out. Judge Breyer calls them as he sees them, with no evident biases. He rules for and against individuals and corporations who sue the government, for and against individuals who sue insurance companies and other corporations, and for and against unions suing companies. As a group, in short, these opinions reflect case-by-case decisionmaking at its best: the judge trying to apply established legal rules to specific fact situations, giving juries, lower courts, and agencies appropriate deference.

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Joel Klein to Bernard Nussbaum re: Judge Breyer's Opinions (11 pages)	06/10/1993	P5 6444
002. list	re: Interview Requests for Stephen G. Breyer (partial) (1 page)	06/1994	P6/b(6)

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Stephen Breyer - 1994 Memoranda [Binder] [3]

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RESTRICTION CODES

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MEMORANDUM

TO: Bernard Nussbaum,
Counsel to the President

FROM: Joel Klein

DATE: June 10, 1993

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today whose corpus of opinions is as professionally distinguished, and I believe that Judge Breyer has the potential to rank with the most distinguished judges in our past.

For an overall assessment of his placement on the "liberal-to-conservative" spectrum, as those terms are generally used, I would say that, in most social areas of the law (often, individual-versus-government cases), Judge Breyer is a moderate. He is careful in applying law to facts and does not typically embrace broad, far-reaching legal principles; his opinions are thus neither "pro-individual" nor "pro-government." In areas of economic regulation, on the other hand, Judge Breyer is generally conservative; he is skeptical of government's, and particularly the courts', capacity to regulate markets, and he has concentrated considerable attention on the dangers of overregulation. More frequently in this area than in the social area, he paints with a broad brush.

With respect to what are traditionally thought to be the three general areas of Supreme Court jurisprudence -- constitutional law, statutory construction, and agency review -- Judge Breyer's methodology is well-developed and easy to discern only in the latter two areas. Specifically, his approach to statutory construction is broad-based, relying heavily on the language of the statute, but using, where helpful, legislative history and other traditional interpretative aides. He has recently written an article on this issue, responding to Justice Scalia's argument that legislative history should be ignored in statutory interpretation. On the Uses of Legislative History in

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Interpreting Statutes, 65 So. Cal. L. Rev. 845 (1992). Judge Breyer's views place him well in the mainstream of the current Court's approach on this issue.

In the area of agency review, Judge Breyer also has a well-thought-through doctrinal approach. He strongly favors deferential, but real, review. In other words, his opinions respect the agency's discretion in exercising its responsibilities, but they also do the hard work of determining whether a decision is, in fact, reasonable (though not necessarily the result Judge Breyer himself would have reached), paying careful attention to the administrative record. This approach contrasts with many judges who reflexively tend to uphold agency decisions and many others who tend to substitute their own preferred solution for that of the agency. In my view, this approach would place Judge Breyer in the more aggressive wing of the current Court in terms of administrative review. In a significant number of cases (approximately 35-40%), he overturns agency decisions. One particularly noteworthy example here is Judge Breyer's opinion in NAACP v. HUD, 817 F.2d 149 (1987), which holds that the adequacy of HUD's efforts to enforce a congressional policy of racial nondiscrimination under the Fair Housing Act is judicially reviewable.

Judge Breyer's views on constitutional law and civil rights are substantially less developed. These have simply not been a subject of his non-judicial writings, and his opinions tend to be reasonably straightforward applications of settled precedent. In the area of privacy, he has written nothing that

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sets out a doctrinal view. In his one abortion opinion (a dissent), he rejected a federal court challenge to the adequacy of the judicial bypass procedures provided under Massachusetts' parental-consent law, concluding that the Supreme Court had previously upheld the statute and that challenges to the state courts' administration of it should be raised in state, not federal, court. And in the area of criminal procedure, Judge Breyer applies existing Supreme Court precedent with, if anything, a somewhat conservative (pro-government) view. He has never opined on any death penalty issue.

For what it is worth, my guess is that Judge Breyer's views in constitutional law are less than fully developed largely because of his long-standing interest, teaching, and writing in the fields of economic regulation, antitrust, and administrative law. In those areas, his opinions reflect a confidence and a breadth of knowledge that make them special. He has been a real leader in those fields and I would suppose that his colleagues on the First Circuit have frequently deferred to him. In constitutional cases, on the other hand, I would surmise that he is just as happy to have others write the opinion when he is in the majority.

2.a. Antitrust and Economic Regulation. This is the area of law where Judge Breyer's views are most thoroughly developed and, I would suspect, likely to be most controversial. He is a major player in this arena, and other scholars write about him and his work. See, e.g., Latin, Legal and Economic

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Considerations In the Decisions of Judge Breyer, 50 Law & Contemp. Prob. 57 (1987).

Judge Breyer largely follows what is called the "Chicago-school" approach to economic regulation. He believes in market efficiency and is generally skeptical of judicial (and even executive) efforts to improve the market, because such efforts, in his view, frequently have unintended and unknowable consequences. He does not think that "small is beautiful": he is skeptical of attempts to use the antitrust laws to break up large operations that seem efficient in favor of smaller competitors that may be less efficient. Some of his opinions in this field are truly textbook examples of this kind of economic antitrust analysis. See, e.g., Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227 (1983) (predatory pricing); Grappon Inc. v. Subaru of New England, Inc., 858 F.2d 792 (1988) (tying arrangements); Town of Concord, Mass v. Boston Edison Co., 915 F.2d 17 (1990) (monopoly price squeeze in regulated industry). These are clear, comprehensive, and powerful analytic pieces.

Judge Breyer's views in this area are, in today's terms, conservative. In 20 cases he has ruled for the defendant all 20 times, often affirming, but not infrequently reversing, the trial court. A recent law review article concludes, using the author's criteria of "liberal" and "conservative," that Judge Breyer has a "more conservative voting record[]" in antitrust cases than Judge Posner, the "Dean" of the Chicago school. Kovacic, Reagan's Judicial Appointees and Antitrust in the 1990s, 60 Fordham L. Rev. 49, 89 (1991). The same article also remarks that "no

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federal judge writes more thoughtfully and elegantly about antitrust issues than Judge Breyer." Id. at 95.

Much as in antitrust, Judge Breyer's views about governmental risk regulation (with respect to the environment or the workplace, for example) are also generally viewed as conservative. In one well-known case, he rejected the EPA's effort to enforce higher standards in a clean-up operation subject to the "superfund" statute. United States v. Ottati & Goss, Inc., 900 F.2d 429 (1990). His analysis reflects the view that regulatory enforcement has to be more hard-nosed about balancing incremental cost against incremental benefit.

This view recently has been elaborated in Judge Breyer's "Holmes Lectures," delivered last year at Harvard Law School and soon to be published by Harvard University Press. This is an important piece and is bound to get considerable attention. Indeed, it was recently favorably reviewed by a strong conservative, Michael Bennett, in The Washington Times (6/8/93). (I am attaching our reviewers' two-page summary of Judge Breyer's lectures along with the Washington Times column discussing them.) In a nutshell, Judge Breyer argues against overregulation ("tunnel vision") and proposes a new regulatory unit (as part of the Office of Information and Regulatory Affairs at OMB) that would be staffed by experts who would impose a government-wide cost/benefit approach to risk regulation. (A similar proposal has apparently been offered by several Republicans as a rider to the Administration's bill elevating EPA to cabinet level. This

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kind of proposal may bring to mind some of the ideas associated with the "Competitiveness Council" of the prior Administration.)

There is one other (less recent) article on regulatory matters that merits mention. In Vermont Yankee and the Court's Role in the Nuclear Energy Controversy, 91 Harv. L. Rev. 1833 (1978), Judge Breyer strongly argues for the development and use of nuclear energy, and criticizes the Supreme Court's decision requiring the NRC to pay greater attention to a proposed nuclear facility's capacity to deal effectively with waste. The theme of the article is that "the licensing of nuclear power plants is no more likely to injure health or the environment than failure to license them." Id. at 1834.

b. First Amendment. With respect to free speech, Judge Breyer has written one very strong pro-First Amendment opinion. In Ozonoff v. Beznak, 744 F.2d 224 (1984), he invalidated a 1953 loyalty oath applicable to U.S. citizens who work at the World Health Organization. Judge Breyer also wrote an important opinion for his court in Wald v. Regan, 708 F.2d 794 (1983), striking down a Treasury Department regulation restricting the rights of U.S. citizens to travel to Cuba: he held that the regulation violated a federal statute, but his interpretation was strongly influenced by First Amendment concerns. This decision was reversed by the Supreme Court in a 5-4 vote, with Justice Blackmun writing a strong dissent (joined by Justices Brennan, Marshall, and Powell). In addition, Judge Breyer has written a lot of opinions on "political patronage," growing out of a change in government in Puerto Rico (over which the First Circuit has

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jurisdiction). He has generally been quite flexible (probably somewhat more so than the Supreme Court) in allowing a new government to discharge "political" employees. See Agosto-Felician v. Aponte-Rogue, 889 F.2d 1209 (1989); Figueroa-Rodriguez v. Lopez-Rivera, 878 F.2d 1478 (1989) (en banc).

With respect to freedom of religion, Judge Breyer appears to be something of a centrist: he has taken a somewhat more practical, less doctrinally clean view of church-state relations than many judges on either side of this issue. This probably can be seen best in Members of Jamestown School Comm. v. Schmidt, 699 F.2d 1 (1983), where the court upheld public funding for transportation to private, including religious, schools; but while the liberal majority reached that result reluctantly (based on Supreme Court precedent), Judge Breyer was not at all grudging in his concurrence upholding this policy. See also New Life Baptist Church Academy v. E. Longmeadow, Mass., 885 F.2d 940 (1989) (rejecting religious school's objection to the requirement of government approval; relies on importance of state interest in ensuring competent secular component of education).

c. Privacy. Judge Breyer has written only one opinion in this area, the parental-consent case noted above. Planned Parenthood League of Massachusetts v. Bellotti, 868 F.2d 459 (1989). He dissented from a ruling that allowed plaintiffs in federal court to try to show that the judicial bypass procedure in Massachusetts was in fact burdensome and difficult -- thus deterring young women from getting an abortion -- and simultaneously pointless (because in the end, the state courts

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almost invariably ruled for the woman). Judge Breyer concluded that, even if the plaintiffs could prove these facts, the statute would be constitutional in view of an earlier Supreme Court decision upholding the statute against a facial challenge. In substance, Judge Breyer took the position that the federal courts should not be reviewing the operation of state court proceedings in practice and that problems of that sort should be addressed by the state courts themselves.

It is also worth noting here that, while we did not generally analyze cases in which Judge Breyer simply joined another judge's opinion, we did look at Massachusetts v. Sullivan, 899 F.2d 53 (1990), which struck down the "gag" rule applied to family planning programs receiving federal funds. The Supreme Court subsequently took a different view of this issue in Rust v. Sullivan.

d. Civil Rights. With the exception of the case mentioned above, NAACP v. HUD, which held that the federal courts could review the adequacy of HUD's efforts to ensure nondiscrimination in public housing, Judge Breyer's opinions in this area tend to be relatively straightforward applications of Supreme Court precedent. He has upheld two affirmative-action consent decrees against challenges by white government employees. Stuart v. Roache, 951 F.2d 446 (1991); Massachusetts Ass'n of Afro-American Police, Inc. v. Boston Police Dep't, 780 F.2d 5 (1985). In a similar vein, Judge Breyer took a generally broad enforcement approach with respect to a consent decree involving

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female employees at Brown University. Lamphere v. Brown University, 798 F.2d 532 (1986).

There is one case in the area of handicapped rights that is likely to be controversial. In Wynne v. Tufts University School of Medicine, 932 F.2d 19 (1991) (en banc), Judge Breyer dissented from a holding that Tufts Medical School had to explore more options at accommodation before it could expel a dyslexic medical student who performed poorly on multiple-choice exams. Judge Breyer would have upheld the school decision to expel, largely on the ground that the student's "particular disability, a psychological learning disadvantage, is closely related to the kind of characteristic, namely an inability to learn to become a good doctor, to which Tufts reasonably, and lawfully, need not 'accommodate.'" Id. at 30-31.

e. Criminal Law. Judge Breyer's opinions in this area are very much in the mainstream of the Supreme Court's current criminal law jurisprudence, which itself is quite conservative. He rarely finds a fourth amendment violation and, indeed, has dissented in two "sensitive" cases where the majority did so find. United States v. Guarino, 729 F.2d 864 (1984) (general warrant for obscenity search); United States v. Bergman, 717 F.2d 651 (1983) (airport search based on DEA profile). His opinions concerning the Sentencing Guidelines, which he was involved in drafting, are generally uneventful (even though the Guidelines themselves are quite controversial), typically, though not always, uphold the trial judge. He accords substantial latitude to prison officials. See Aruder v. Fair, 710 F.2d 886 (1983)

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(prisoners may be strip-searched both before and after leaving cell). He has not, however, turned a blind eye to some truly appalling prison conditions. Morales-Feliciano v. Parole Board of Puerto Rico, 887 F.2d 1 (1989); Cortes-Quinones v. Jimenez-Nettleship, 842 F.2d 556 (1988).

f. Miscellaneous Civil. Judge Breyer has written opinions in numerous other areas -- such as labor law, immigration law, environmental law, tort law, social security law, securities laws, etc. These opinions, while well-reasoned and well-written, do not otherwise stand out. Judge Breyer calls them as he sees them, with no evident biases. He rules for and against individuals and corporations who sue the government, for and against individuals who sue insurance companies and other corporations, and for and against unions suing companies. As a group, in short, these opinions reflect case-by-case decisionmaking at its best: the judge trying to apply established legal rules to specific fact situations, giving juries, lower courts, and agencies appropriate deference.

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Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Don Verrilli to Clifford Sloan re: Breyer Confirmation (3 pages)	06/14/1994	P5 6445

COLLECTION:
Clinton Presidential Records
Counsel's Office
Tom Castleton
OA/Box Number: 7592

FOLDER TITLE:
TEC [Thomas Castleton] - Breyer Confirmation, 1994 [4]

2006-1067-F
ds368

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Tom C.

6445

M E M O R A N D U M

TO: Clifford Sloan
Associate Counsel to the President

FROM: Don Verrilli

DATE: June 14, 1994

SUBJECT: Breyer Confirmation - Gendron

Per your request, we have looked into possible issues arising out of Judge Breyer's decision in United States v. Gendron, 18 F.3d 955 (1st Cir. 1994).

In Gendron, Judge Breyer held that the federal child pornography statute, 18 U.S.C. § 2252, should be interpreted as requiring scienter and therefore raises no First Amendment problems. In particular, Breyer concluded that conviction under Section 2252 required proof that the defendant knew of the nature of the materials. Breyer applied the sensible principle that a statute would not be construed to create a strict liability crime absent a clear statement by Congress. He did decide whether the First Amendment demands a scienter requirement for child pornography statutes, or state what that requirement would be, but he twice indicated generally that such a requirement was "likely." Id. at 960.

Gendron is in acknowledged conflict with the Ninth Circuit's ruling in United States v. X-citement Video, 982 F.2d 1285 (9th Cir. 1992). In that case, the Ninth Circuit applied strict grammatical rules of construction to Section 2252, concluded that the statute created a strict liability offense with respect to whether the materials at issue

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constituted child pornography, and was therefore unconstitutional under New York v. Ferber, 458 U.S. 747, 765 (1982).[1/]

X-Citement Video is presently before the Supreme Court. The key issue is scienter. If a scienter requirement is read into the statute, it is likely to be the minimum scienter required by the First Amendment. Therefore, the case is likely to address the constitutional as well as the statutory question.

In amicus briefs, groups such as the National Center for Law and Children and the National Coalition against pornography argue that the First Amendment, and thus Section 2252, should require nothing more than knowledge that the materials involve sex. Producers and purchasers should, on this view, assume the risk that the participants are minors.

The United States, joined by traditional first amendment groups, has urged a stricter scienter requirement. On this view, the defendant must know the materials depict minors or be willfully blind to that fact.

An intermediate position, advocated by the National Family Legal Foundation, would impose a recklessness standard.

[1/] X-Citement Video has also been criticized by other Circuits. See United States v. Burian, 19 F.3d 188 (5th Cir. 1994); United States v. Gifford, 17 F.3d 462 (1st Cir. 1994); United States v. Cochran, 17 F.3d 56 (3d Cir. 1994).

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Given the pendency of X-Citement Video, and the importance of this issue to the religious right, Judge Breyer may well be asked his views on the scienter requirement both as a matter of statutory interpretation, and as a matter of First Amendment law.

The United States, joined by traditional first amendment groups, has urged

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Withdrawal/Redaction Sheet
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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001a. letter	Stephen Breyer to Julian Abele Cook, Jr.; re: Disclosure of Position (1 page)	05/06/1992	P6/b(6)
001b. letter	Julian Abele Cook, Jr. to Stephen Breyer; re: No Disclosure Necessary (1 page)	05/29/1992	P6/b(6)
002. memo	Cliff Sloan to Preeta Bonsal et al re: Pressing confirmation issues (3 pages) (partial)	07/11/1994	P5 b(6) 6446

COLLECTION:
Clinton Presidential Records
Counsel's Office
Beth Nolan
OA/Box Number: 5610

FOLDER TITLE:
S. Breyer - Ethics Issues [8]

2006-1067-F
jp2487

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
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P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
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b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

July 11, 1994

6446

TO: Preeta Bonsal
Chris Cerf
Susan Davies
Cheryl Mills
Beth Nolan
Laura Radack
Kathi Whalen

FROM: Cliff Sloan

SUBJECT: Pressing confirmation tasks

Attached is a list from Cathy Russell of outstanding requests. We need to get back to Cathy on these things today. I have put names down next to tasks, in most cases confirming previous conversations. Let's make sure that these get done today. I have also included my own list of other pressing tasks. Let's try to get these done today also.

Thanks very much.

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CLIFF

* (b)(6)
* (b)(6)
* **COMPENDIUM -- CODE OF CONDUCT RE RECUSAL.** BETH
* **IS JUDGE BREYER NOTIFIED WHEN HE IS AUTOMATICALLY RECUSED?** SUSAN
* **PREVIOUS FINANCIAL DISCLOSURE FORMS.** CHERYL
* **LIST OF PEOPLE WHO WILL SIT BEHIND HIM. (ABOUT 20 IS OUR LIMIT)** SUSAN
* **FINAL WITNESS LIST.** SUSAN
* **WHO WILL BE WITH HIM AT CLOSED SESSION (SCHEDULED FOR THURSDAY AM).** JOEL/CLIFF

(b)(6)

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Additional tasks

1. Experts (John Frank, Ken Starr, Leon Higginbotham) -- Chris

2. Confirm that name is limited to his proportionate share (Chris)

3. Determine confidentiality to be asserted w/documets (Cliff)

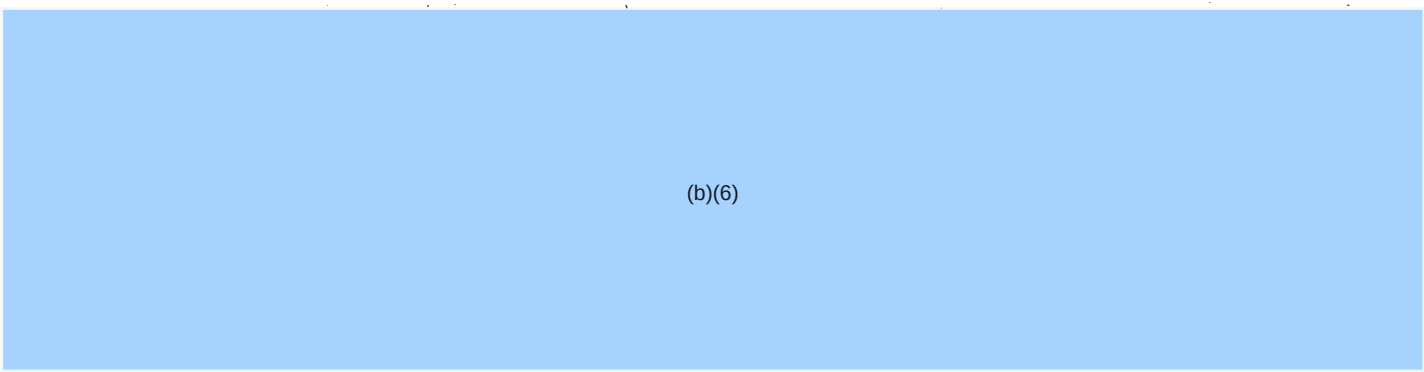
4. Produce old & new documents to Hill (Cliff/Laura/Florence)

5. Prepare 10 copies for press distribution if necessary (Cliff/Laura)

6. Get back to Metz office re: letters (Cliff)

7. Prepare press response package (Gillers, NY Bar, analysis of cases, Godfrey Hodgson, 28 U.S.C. 455, leading 455 cases) -- Preeta

8. Prepare fact sheet for Senate offices (Cliff, Preeta)



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Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Ron Klain to Bernie Nussbaum re: Areas of Discussion (2 pages)	06/11/1993	P5 Dup 6447
002. memo	Ron Klain to Howard Paster and Bernie Nussbaum (2 pages)	06/08/1993	P5
003. form	re: Judgeship Questionnaire Response - Stephen Gerald Breyer (partial) (6 pages)	10/01/1980	P6/b(6)

COLLECTION:
Clinton Presidential Records
Counsel's Office
Victoria Radd
OA/Box Number: 5336

FOLDER TITLE:
Counsel - Supreme Court 1994/Supreme Court Potential Judges: Stephen Breyer [3]

2006-1067-F
jp2518

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
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6447

June 8, 1993

MEMORANDUM FOR HOWARD PASTER AND BERNIE NUSSBAUM

FROM: RON KLAIN

SUBJECT: HILL CONSULTATIONS REGARDING BREYER & SOCIAL SECURITY PROBLEM

Sup A

I want to give you an update on where we stand on this, and get your direction/assistance on where we go from here.

Senators Who Have Been Contacted

I have spoken to the following Senators, who have responded as follows:

- Biden: He is going to get back to me today with his final answer, but he was positive.
- Kennedy: Of course, he is fine.
- Hatch: He is ready to defend Breyer to the death.
- Thurmond: Probably is OK. Doesn't really understand the problem. Likes Breyer generally.

If we can lock down Biden, we would have the Committee leadership on board.

Senators Who Need **IMMEDIATE** Attention

Two Senators need attention as soon as possible, and certainly this morning:

- Metzenbaum: He does not like Breyer because he is conservative on antitrust, and because Hatch/Dole like Breyer. I am having Kennedy talk to Metzenbaum, and Bob Pitofsky call him as well (re: antitrust).
- Dole: He was supposedly briefed on Breyer's social security problem before he endorsed him, but we do not know. Sheila Burke has not yet returned my calls.

I think it would be best if Howard touched base with these two Senators before noon.

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Senators Who Need Consultation

In addition, the remaining key Senators on the Committee need to be made aware of Breyer's problem, and consulted. I would rank them in this order of importance:

- Leahy: He can be prickly if ignored, and he has been ignored.
- Moseley-Braun: Same as above, and we will need her not to cry "double-standard" on us.
- Feinstein: She is very skittish on the social security issue generally.
- Simon: He could be susceptible to Metzenbaum's arguments against Breyer.
- Simpson: As the leadership point person on the Committee, he must be consulted.
- Grassley: He can be difficult and stubborn, and probably remembers Breyer the least.
- Specter: Same as above, with Grassley. Also, he likes the personal attention.
- Brown: He has caused the most problems for our nominees.

I would rate as lower priorities the remaining members of the Committee: DeConcini, Heflin, Kohl, Pressler, and Cohen.

I have raised with Senator Kennedy's staff the question of how they want to deal with these people, and they will get back to us by noon with an answer. As Breyer's Senate sponsor, Senator Kennedy may want to deal with some of these people (e.g., Leahy, Simon, Simpson) directly.

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